Supreme Court, U.S.
FILED

091377 MAY 11 2010

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

THE STATE OF OHIO,

Petitioner,

v.

ANTWAUN SMITH,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

STEPHEN K. HALLER*
PROSECUTING ATTORNEY
ELIZABETH A. ELLIS
ASSISTANT PROSECUTING ATTORNEY
GREENE COUNTY PROSECUTOR'S OFFICE
61 GREENE STREET, SECOND FLOOR
XENIA, OH 45385
(937) 562-5250
shaller@co.greene.oh.us

** Counsel of Record*
Counsel for Petitioner

May 11, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

Whether, under the Fourth Amendment of the United States Constitution, a cellular phone found upon a person incident to lawful arrest is a container that may be searched without a warrant?

Whether, under the Fourth Amendment of the United States Constitution, a limited search of the call log of a cellular phone, found upon a suspect incident to his lawful arrest, is reasonable, where the officer has probable cause to believe the cellular phone contains evidence of the crime for which the suspect is arrested?

Whether the application of the Exclusionary Rule is warranted, where the record demonstrates that officers had probable cause to believe the cellular phone found on a person incident to arrest contained evidence of the drug trafficking for which he was arrested, and where the Defendant was not prejudiced by the introduction of evidence obtained from the search?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

CITATIONS TO OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

RELEVANT CONSTITUTIONAL PROVISIONS . 1

INTRODUCTION 2

STATEMENT 5

REASONS FOR GRANTING THE WRIT 9

I. This case presents an issue of first impression for this Court, the Federal District Courts are in conflict on this issue, despite rulings on from at least three of the Circuit Courts of Appeal that cell phones may be searched as containers incident to arrest. *See United States v. Wurie*, 612 F. Supp. 2d 104 (D. Mass. 2009); *United States v. Valdez*, No. 06-CR-336, 2008 WL 360548, at *3 (E.D.Wis. Feb. 8, 2008); *United States v. Dennis*, No. 07-008-DLB, 2007 WL 3400500, at *7 (E.D.Ky. Nov. 13, 2007); *United States v. Parada*, 289 F. Supp. 2d 1291, 1304 (D.Kan. 2003); *United States v.*

Ajan, Nos. 2:02-CR-71, 2:06-CV-24, 2009 WL 1421183 (E.D. Tenn. May 20, 2009), *cf. United States v. Park*, No. 05 375, 2007 WL 1521573 (N.D. Cal. May 23, 2007), and *United States v. Wall*, No. 08-60016-CR-ZLOCH, 2008 WL 5381412 (S.D. Fla. Dec. 22, 2008). Moreover, the Ohio Supreme Court has decided an important federal question in a way that conflicts with the Supreme Court of Connecticut and the United States Courts of Appeal. See *State v. Boyd*, SC 17719, 295 Conn. 707, 2010 WL 1526467 (Conn. Apr. 27, 2010); *United States v. Finley*, 477 F.3d 250 (C.A. 5, 2007); *United States v. Murphy*, 552 F.3d 405 (C.A. 4, 2009); *United States v. Ortiz*, 84 F.3d 977 (C.A. 7, 1996). Thus, law enforcement agencies are subject to inconsistent mandates. Presently, the nation needs this Court's guidance on this issue. 10

II. This is an issue of great importance. In the past twenty years, cellular phones have evolved from novel to commonplace, with a majority of Americans carrying them. Further, more and more criminals are using cellular phones to commit crimes. Only this Court can properly determine what constitutes reasonable exceptions to the Fourth Amendment in the digital age. . . . 19

III. The decision of the Ohio Supreme Court is in error, and enacts a sweeping new Fourth Amendment rule based upon the abstract capabilities of a cell phone, which is at odds with this Court's previous holdings.

Further, the Ohio Supreme Court has refused to consider whether the application of the exclusionary rule is warranted and the reasonableness of the officer's conduct. . . . 22

CONCLUSION 24

APPENDIX

Appendix A: Opinion and Judgment, Ohio Supreme Court, filed December 15, 2009 . . . . . 1a

Appendix B: Opinion, Court of Appeals, filed July 25, 2008 . . . . . 21a

Appendix C: Judgment Entry, In the Common Pleas Court of Greene County, Ohio, filed April 26, 2007 . . . . . 44a

Appendix D: Judgment Entry, In the Common Pleas Court of Greene County, Ohio, filed April 11, 2007 . . . . . 50a

Appendix E: Reconsideration Entry, Ohio Supreme Court, filed February 10, 2010 . . . . . 59a

TABLE OF AUTHORITIES

Cases

Arizona v. Gant,
556 U.S. ___, 129 S.Ct. 1710 (2009) 2, 3

Chimel v. California,
395 U.S. 752 (1969) 2, 3, 11, 12

Herring v. United States,
129 S. Ct. 695 (2009) 23

New York v. Belton,
453 U.S. 454, 101 S. Ct. 2860 (1981) 22

Smith v. Maryland,
442 U.S. 735, 99 S. Ct. 2577 (1979) 21

State v. Boyd,
SC 17719, 295 Conn. 707, 2010 WL 1526467
(Conn. Apr. 27, 2010) 4, 9, 11, 18

State v. Martinez,
Shelby County App. No. 13-04-49, 2006-Ohio-
2002 24

State v. Matthews,
46 Ohio St.2d 72, 346 N.E. 2d 151 (1976) 12

U.S. v. Edwards,
415 U.S. 800 (1974) 12, 15, 16

United States v. Ajan,
Nos. 2:02-CR-71, 2:06-CV-24, 2009 WL 1421183
(E.D. Tenn. May 20, 2009) 9, 10, 17

United States v. Chadwick,
433 U.S. 1, 97 S.Ct. 2476 (1977) 14

United States v. Dennis,
No. 07-008-DLB, 2007 WL 3400500 (E.D.Ky. Nov. 13, 2007) 9, 10, 17

United States v. Finley,
477 F.3d 250 (C.A. 5, 2007), *cert. denied*, 127 S. Ct. 2065 ..... *passim*

United States v. James,
No. 1:06CR134 CDP, 2008 WL 1925032 (E.D.Mo. Apr. 29, 2008) 9

United States v. Murphy,
522 F.3d 405 (C.A. 4, 2009), cert. denied, ___ U.S. ____, 129 S.Ct. 2016 (2009) 4, 9, 11, 16

United States v. Ortiz,
84 F.3d 977 (C.A. 7, 1996) 4, 9, 11, 16, 20

United States v. Parada,
289 F. Supp. 2d 1291 (D.Kan. 2003) 9, 10, 17, 18

United States v. Park,
No. 05-375, 2007 WL 1521573 (N.D. Cal. May 23, 2007) 4, 9, 10, 18, 20

United States v. Robinson,
414 U.S. 218 (1973) 2, 12

United States v. Valdez,
No. 06-CR-336, 2008 WL 360548 (E.D. Wis. Feb. 8, 2008) 9, 10, 20

United States v. Wall,
No. 08-60016-CR-ZLOCH, 2008 WL 5381412
(S.D. Fla. Dec. 22, 2008) 4, 9, 10, 18

United States v. Wurie,
612 F. Supp. 2d 104
(D. Mass. 2009) 9, 10, 16, 17

Constitution

U.S. Const. amend IV ..... *passim*

Statutes

28 U.S.C. §1257(a) 1

Ohio Rev. Code 2921.12(A)(1) 5

Ohio Rev. Code 2923.24(A) 5

Ohio Rev. Code 2925.03(A) 5

Ohio Rev. Code 2925.11(A) 5

PETITION FOR A WRIT OF CERTIORARI

Petitioner State of Ohio respectfully petitions this Honorable Court for a writ of certiorari *to the Supreme Court of Ohio* in *State v. Smith*, 124 Ohio St. 3d 163, 920 N.E. 2d 949, 2009-Ohio-6246.

CITATIONS TO OPINIONS BELOW

The Opinion of the Supreme Court of Ohio issued December 15, 2009 is published at 124 Ohio St. 3d 163, 920 N.E. 2d 949. The Order of the Supreme Court of Ohio (entered February 10, 2010) denying reconsideration is unpublished and unreported. The opinion of the Court of Appeals of Ohio, Second Appellate District, issued July 25, 2008 is published on the Supreme Court of Ohio's website at 2008-Ohio-3717, but is unreported. The relevant decisions of the Greene County Court of Common Pleas are unpublished and unreported.

STATEMENT OF JURISDICTION

The Supreme Court of Ohio initially decided this case on December 15, 2009, and Petitioner's timely motion for reconsideration on February 10, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides in relevant part that: "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

INTRODUCTION

The State of Ohio urges this Court to reverse the decision of the Ohio Supreme Court, which held that a cellular phone found on the person of a suspect is not a "container" to be searched incident to a lawful arrest without a warrant. The State submits that although cellular phones continue to advance in technology, there is nothing deserving of special treatment about a cellular phone or its address book/call log that require a higher level of Fourth Amendment protection than other containers found on a person incident to a lawful arrest. An address book is an address book, regardless of whether it is in paper or digital form. As Justice Cupp, joined by Justice Stratton and Justice O'Donnell, wrote in his dissent below, "[t]he majority needlessly embarks upon a review of cell phone capabilities in the abstract in order to announce a sweeping new Fourth Amendment rule that is at odds with decisions of other courts that have addressed similar questions." *State v. Smith*, 124 Ohio St. 3d 163 at ¶30.

Indeed, this Court recently reaffirmed that the warrant exception for a search incident to arrest derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations. *Arizona v. Gant*, 556 U.S. ___, 129 S.Ct. 1710 (2009), qtg. *United States v. Robinson*, 414 U.S. 218, 230-234 (1973); *Chimel v. California*, 395 U.S. 752, 763 (1969). This Court reasoned, "[t]hat limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might

conceal or destroy. *Gant*, supra, qtg. *Chimel*, supra. Thus, the search to preserve evidence from the cellular phone, which the officers have probable cause to believe contains evidence of the very crime for which the Defendant is arrested, and which evidence is inherently capable of being destroyed, on the person of a suspect who has been lawfully arrested, is reasonable and is narrowly tailored to safeguard the protections of the Fourth Amendment.

This case presents an issue of great importance, as police officers across the nation are confronting issues of preserving evidence in the face of advancing technology every day. For instance, the iphone has a program entitled "mobileme" which allows for anyone using the internet with account access to remotely delete all information stored on the phone, including all call log information, text messages, and emails. Thus, if the police are forced to wait for a search warrant, the suspect's associates could remotely wipe the phone clean if alerted that the suspect has been arrested. Even if the officers turn off the phone while obtaining a warrant, the deletions would occur upon turning on the phone. More troubling for evidence preservation purposes is the smart phone application entitled "tigertext," which allows for the text messages on both the sender's and receiver's phones to self-destruct upon reading. There, officers may literally have only minutes to preserve evidence on a cell phone. Cell phones are further different than personal computers because deleted data cannot be recovered from most cell phones, whereas it can be recovered from personal computers. The State of Ohio submits that there is nothing inherent in the protections of, or the exceptions to, the Fourth Amendment that necessitate a break with long established precedent

and justifies the conclusion reached by the Ohio Supreme Court. However, if this Court is inclined to consider the technological capabilities of modern cellular phones, it is clear that those capabilities make it imperative for police to secure evidence without waiting for a warrant.

Further, the State of Ohio urges this Court to address this issue as there are conflicts between state jurisdictions, as well as federal jurisdictions. Very recently, the Supreme Court of Connecticut affirmed the search and seizure of a cellular phone and its contents, as a container to be searched pursuant to the automobile exception to the warrant requirement of the Fourth Amendment. *State v. Boyd*, SC 17719, 295 Conn. 707, 2010 WL 1526467 (Conn. Apr. 27, 2010). The Fourth, Fifth, and Seventh Circuit Courts of Appeal have affirmed warrantless searches of cell phones and pagers. *United States v. Finley*, 477 F.3d 250 (C.A. 5, 2007); *United States v. Murphy*, 552 F.3d 405 (C.A. 4, 2009); *United States v. Ortiz*, 84 F.3d 977 (C.A. 7, 1996). As discussed more fully below, the majority of District Courts that have considered the issue have followed *Finley*, while the District Courts for Northern District of California and the Southern District of Florida, as well as the Ohio Supreme Court, and have rejected *Finley*. *See United States v. Park*, No. 05-375, 2007 WL 1521573 (N.D. Cal. May 23, 2007); *United States v. Wall*, No. 08-60016-CR-ZLOCH (S.D. Fla. Dec. 22, 2008).

Lastly, in the instant case, the State of Ohio submits that even if this Court finds that the search of the cell phone is improper, the Defendant cannot show, based upon the overwhelming evidence of guilt, that he is prejudiced by the introduction of the photographs

showing the caller identification (caller ID) of the informant's cellular phone number on the Defendant's phone. The testimony of the informant, Wendy Northern, established that she knew the Defendant, she arranged to buy drugs from the Defendant, and she was able to identify the Defendant. The officers also testified that the Defendant was present at the scene, and in close proximity to the drugs that were found, which corroborates the testimony of Northern. Thus, the introduction of the evidence obtained from Smith's cellular phone is purely corroborative, and is hardly prejudicial in light of the other testimony presented.

STATEMENT

1. On February 2, 2007, The Defendant was indicted by the Greene County Grand Jury as follows: Count I, Trafficking in Cocaine, in violation of Ohio Revised Code 2925.03(A) and a felony of the first degree; Counts II and III, Possession of Criminal Tools, in violation of Ohio Revised Code 2923.24(A) and felonies of the fifth degree, Count IV, Possession of Cocaine, in violation of Ohio Revised Code 2925.11(A) and a felony of the first degree; and Count V, Tampering With Evidence, in violation of Ohio Revised Code 2921.12(A)(1) and a felony of the third degree.

2. The basic facts underlying the charges are that Detectives from the Greene County Agencies For Combined Enforcement (ACE) Task Force were dispatched to Miami Valley Hospital as a result of a possible drug overdose suffered by Wendy Northern of Beavercreek, Greene

County, Ohio. At the hospital, the Detectives asked Ms. Northern about her main drug supplier and if she would cooperate with their investigation. Ms. Northern gave the Detectives information needed to identify her drug supplier, to whom she referred as "Capo". Through investigiation, Northern was able to identify Defendant Smith as "Capo".

3. Upon release from the hospital, the Detectives next asked Northern to place a controlled call to Smith, and to request an ounce of crack cocaine. During the conversation, Smith agreed to come to Northern's home to deliver the crack cocaine. Smith did not arrive at the agreed upon time, due to some transportation issues. As Northern was being transported back to the jail, Smith called her and advised that he was in her driveway. This information was immediately relayed to police.

4. When officers arrived on scene, there were two males and one female in a black SUV in Northern's driveway. Smith and his passengers were ordered out of the vehicle at gunpoint. Officer Williams ordered Smith to put his hands up, but he did not comply; this command was repeated several times before Smith finally complied. Smith also shuffled his feet as he was walking back toward the officers. On this particular day, there were three to six inches of snow on the ground, and the crack cocaine was discovered in the snow under the footprint left by Smith when he exited the vehicle.

5. Smith was arrested with a cell phone, $2500.00 in cash, and a baggie of marijuana on his person, which was discovered in the search incident to his arrest. The record is unclear as to when the phone was first searched, although it demonstrates that at least part of the search was conducted when officers returned to the police station immediately after they secured the crime scene. At some point, the police searched the phone for the call records demonstrating that Smith's phone had been used to speak with Northern. The police documented the phone's records by taking photographs of the recent call history list. The police did not have a warrant or Smith's consent to search the phone.

6. The Defendant entered a plea of not guilty to all the charges contained in the indictment. The Defendant filed a motion to suppress any statements made, as well as a motion to suppress evidence taken from the Defendant's cell phone upon his arrest. After a hearing, the trial court sustained the Defendant's motion with respect to any statements he made to police, and overruled the motion with respect to the cell phone search. The trial court did, however, suppress photos taken from the cell phone on the basis that they were not relevant to the case.

7. After a jury trial was held on March 26-28, 2007, the jury returned a verdict of guilty on all counts. The Defendant was sentenced to a total of 12 years, of which 8 of those years are

mandatory. The Defendant then filed a timely appeal.

8. The Court of Appeals of Ohio, Second Appellate District, affirmed the decision of the trial court to overrule the Defendant's motion to suppress the search of the cell phone, finding that a cell phone is a container and law enforcement may conduct a warrantless search of that container incident to a lawful arrest if that container is on the person.

9. The Defendant next appealed to the Ohio Supreme Court only arguing that the search of his cell phone incident to arrest was in violation of the Fourth Amendment of the United States Constitution. Smith did not argue a violation of Ohio's Constitution. The Ohio Supreme Court reversed both the trial court's and appellate court's decisions on the motion to suppress, as well as the Defendant's conviction, despite the State's argument that the overwhelming evidence in the case did not warrant reversal. The Ohio Supreme Court held that the Fourth Amendment of the United States Constitution prohibits the warrantless search of data within a cell phone seized incident to a lawful arrest when the search is unnecessary for the safety of law enforcement officers and there are no exigent circumstances. *State v. Smith*, 124 Ohio St. 3d 163, 920 N.E. 2d 929, *syllabus*.

REASONS FOR GRANTING THE WRIT

Petitioner respectfully requests this Court grant certiorari for three reasons:

First, this case presents an issue of first impression for this Court, the Federal District Courts are in conflict on this issue, despite rulings on from at least three of the Circuit Courts of Appeal that cell phones may be searched as containers incident to arrest. *See United States v. Wurie*, 612 F. Supp. 2d 104 (D. Mass. 2009); *United States v. Valdez*, No. 06-CR-336, 2008 WL 360548, at *3 (E.D. Wis. Feb. 8, 2008); *United States v. Dennis*, No. 07-008-DLB, 2007 WL 3400500, at *7 (E.D. Ky. Nov. 13, 2007); *United States v. Parada*, 289 F. Supp. 2d 1291, 1304 (D. Kan. 2003); *United States v. James*, No. 1:06CR134 CDP, 2008 WL 1925032 (E.D. Mo. Apr. 29, 2008); *United States v. Ajan*, Nos. 2:02-CR-71, 2:06-CV-24, 2009 WL 1421183 (E.D. Tenn. May 20, 2009), *cf. United States v. Park*, No. 05-375, 2007 WL 1521573 (N.D. Cal. May 23, 2007), and *United States v. Wall*, No. 08-60016-CR-ZLOCH, 2008 WL 5381412 (S.D. Fla. Dec. 22, 2008). Moreover, the Ohio Supreme Court has decided an important federal question in a way that conflicts with the Supreme Court of Connecticut and the United States Courts of Appeal. See *State v. Boyd*, SC 17719, 295 Conn. 707, 2010 WL 1526467 (Conn. Apr. 27, 2010); *United States v. Finley*, 477 F.3d 250 (C.A. 5, 2007); *United States v. Murphy*, 552 F.3d 405 (C.A. 4, 2009); *United States v. Ortiz*, 84 F.3d 977 (C.A. 7, 1996). Thus, law enforcement agencies are subject to inconsistent mandates. Presently, the nation needs this Court's guidance on this issue.

Second, this is an issue of great importance. In the past twenty years, cellular phones have evolved from novel to common place, with a majority of Americans carrying them. Further, more and more criminals are using cell phones to commit crimes. Only this Court can properly determine what constitutes reasonable exceptions to the Fourth Amendment in the digital age.

Third, the decision of the Ohio Supreme Court is in error, and enacts a sweeping new Fourth Amendment rule based on the abstract capabilities of a cell phone, which is at odds with this Court's previous holdings. Further, the Ohio Supreme Court has refused to consider whether the application of the Exclusionary Rule is warranted and the reasonableness of the officers' conduct.

I. **This case presents an issue of first impression for this Court, the Federal District Courts are in conflict on this issue, despite rulings on from at least three of the Circuit Courts of Appeal that cell phones may be searched as containers incident to arrest.** ***See United States v. Wurie*****, 612 F. Supp. 2d 104 (D. Mass. 2009);** ***United States v. Valdez*****, No. 06-CR-336, 2008 WL 360548, at *3 (E.D. Wis. Feb. 8, 2008);** ***United States v. Dennis*****, No. 07-008-DLB, 2007 WL 3400500, at *7 (E.D. Ky. Nov. 13, 2007);** ***United States v. Parada*****, 289 F. Supp. 2d 1291, 1304 (D. Kan. 2003);** ***United States v. Ajan*****, Nos. 2:02-CR-71, 2:06-CV-24, 2009 WL 1421183 (E.D. Tenn. May 20, 2009),** ***cf. United States v. Park*****, No. 05-375, 2007 WL 1521573 (N.D. Cal. May 23, 2007), and**

> ***United States v. Wall*, No. 08-60016-CR-ZLOCH, 2008 WL 5381412 (S.D. Fla. Dec. 22, 2008). Moreover, the Ohio Supreme Court has decided an important federal question in a way that conflicts with the Supreme Court of Connecticut and the United States Courts of Appeal. See *State v. Boyd*, SC 17719, 295 Conn. 707, 2010 WL 1526467 (Conn. Apr. 27, 2010); *United States v. Finley*, 477 F.3d 250 (C.A. 5, 2007); *United States v. Murphy*, 552 F.3d 405 (C.A. 4, 2009); *United States v. Ortiz*, 84 F.3d 977 (C.A. 7, 1996). Thus, law enforcement agencies are subject to inconsistent mandates. Presently, the nation needs this Court's guidance on this issue.**

Allowing a limited search of the call log/caller ID, contact information/address book, and text messages on a cell phone under the immediate control of a suspect recently placed under lawful arrest is reasonable and consistent with the Fourth Amendment. It has been long recognized that a warrantless search of an individual who has been lawfully arrested can be conducted without a resulting violation of the Fourth Amendment. In *Chimel v. California,* this Court recognized that, in an effort to discover and preserve evidence and disarm a suspect before taking them into custody, a government agent may conduct a search incident to arrest. *Chimel v. California*, 395 U.S. 752 (1969). Pursuant to an officer's authority to conduct a search incident to arrest, police are authorized to conduct a full search of the suspect's person and the area within their immediate control. *Id.* A full search of the person, his effects, and the area within his immediate reach at the

time of a lawful custodial arrest may be conducted without regard to any exigency or the seriousness of the offense, and regardless of any probability that the search will yield a weapon or evidence of the crime for which the person is arrested. *United States v. Robinson,* 414 U.S. 218, 236, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). It has also been recognized that a search that could be conducted at the time of arrest may also be legally conducted later when the accused arrives at the location where he will be detained. *U.S. v. Edwards*, 415 U.S. 800 (1974).

While the ability to search the contents of a cell phone incident to arrest is an issue of first impression, it is well established that police may search a container under the person's immediate control incident to that person's arrest. In *State v. Matthews*, 46 Ohio St.2d 72, 346 N.E. 2d 151 (1976), the Ohio Supreme Court held that the warrantless search of a woman's purse, clutched under her arm and under her immediate control, incident to her lawful arrest is reasonable. It is hard to imagine that a cell phone, which can only contain data, is entitled to a greater protection than the contents of a purse or wallet.

The State of Ohio submits that allowing law enforcement to search the caller ID log of a suspect's cell phone incident to his lawful arrest is also reasonable under *Chimel*, *Edwards, Robinson*, & *Matthews*, supra. In the instant case, the search of the Defendant's cellular phone is limited and reasonable, and akin to the search of an address book or a phone number contained in a purse or wallet.

First, a search of a caller ID log to ensure that the suspect's cell phone contains the call log of calls placed

to an informant's cell phone is limited in scope. This is not a case where the law enforcement officers were searching throughout Defendant's emails and other personal data in a general search into other crimes, and using that information as the basis for new investigation. Even if police did exceed the appropriate scope in searching a cell phone incident to arrest, there are evidentiary procedures to cure any abuse of discretion on the part of the officers.

Second, and more importantly, this evidence is helpful to police to ensure the identity of suspect, and that law enforcement has the right person. Ensuring that the police arrest the right person is obviously one of the major goals of our justice system. If, in the instant case, the Defendant's cell phone call log was searched, and the informant's information was not in Defendant's phone, then that evidence would be preserved as exculpatory evidence for the Defendant. Thus, allowing a limited search of a cell phone incident to arrest is sound public policy and reasonably tailored to fulfill a legitimate State interest. Therefore, the trial court and Second District Court of Appeals properly upheld the search of the cell phone as reasonable.

The search of the Defendant's cell phone incident to his arrest was proper because a cellular phone is a container and its immediate search is warranted under exigent circumstances. The opinion below puts great weight on the fact that a modern cell phone is unlike any other item normally transported by a person on a regular basis, due to its capacities for storing vast amounts of information. The State submits that this position is inaccurate and improper for two reasons. First, the phone at issue here is not

a smart phone (i.e. Blackberry, iphone, Palm, etc.). It is a fairly basic cell phone by today's standards and the scope of the search was properly limited in scope to the caller ID log. The information accessed incident to arrest was not password protected. There was no hacking into corporate business records as envisioned by the dissent in the appellate court. Secondly, the search at issue here is nothing more than looking through an address book that one would keep in their purse or wallet. The only difference is that the information is stored electronically, and not on paper.

In this case, the arrest of the Defendant was valid. The police officers had reasonable suspicion the Defendant was engaged in narcotics trafficking, and that was the basis for the Defendant's arrest. The officers had the ability to conduct a full search of the Defendant's person incident to that arrest. The Defendant had a cell phone in his pocket, which is analogous to a closed container. The police had the authority to search this closed container, as they were attempting to preserve evidence of the Defendant's crime. The ACE Task Force had recorded phone calls the Defendant made to the informant; the call records in the cell phone would provide additional proof that the Defendant in fact made the phone calls the Task Force had recorded.

In the court below, the Defendant relied upon *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476 (1977) for the proposition that the search of the cell phone was improper because it was conducted after the arrest at the police station, however *Chadwick* is easily distinguished from a cell phone. The evidence in *Chadwick* was a double-locked footlocker, which was not in danger of any evidence inside being altered or

destroyed. As discussed below, cell phones can only contain a finite amount of information and thus, a search of a phone is necessary to prevent the destruction of evidence. In the case at bar, Detective Polston's testimony is not entirely clear at the motion to suppress whether the cell phone was first searched on scene or when the detectives returned to the police station. However, it has long been recognized that a search which could legally take place at the scene could also legally take place at a later time. See *Edwards*, supra. Further, the information obtained by officers was not password protected, nor was the cell phone "locked," thereby manifesting any additional expectation of privacy. Because the Defendant was the subject of a valid arrest, the police were not required to get a warrant to search his person, and any containers found therein, incident to his arrest. Therefore, the search of the cell phone was legally valid.

Indeed, the overwhelming majority of federal courts deciding the issue have held a defendant's cell phone may properly be searched incident to arrest. In *U.S. v. Finley*, the Defendant drove a drug dealer to the location of a controlled buy for methamphetamine. *United States v. Finley*, 477 F.3d 250 (C.A. 5, 2007), *cert. denied*, 127 S. Ct. 2065. After the sale was completed and the Defendant drove away, his vehicle was stopped. The Defendant and the drug dealer were ultimately arrested at the scene of the traffic stop, and the Defendant's cell phone was searched incident to his arrest. The Defendant's cell phone was searched later at the location of his detention, and revealed text messages discussing narcotics use and trafficking. The Defendant's call records were also searched at this time. The Fifth Circuit Court of Appeals held that the

search of the Defendant's cell phone was a valid search of a container incident to arrest, and the delay between the arrest and the search did not invalidate the search, pursuant to *Edwards, supra*. The *Finley* court further noted that police officers are not constrained to search only for weapons or instruments of escape on the arrestee's person; they may also, *without any additional justification,* look for evidence of the arrestee's crime on his person in order to preserve it for use at trial. *Finley*, 477 F.3d at 259-260, (*emphasis added*). Accordingly, allowing law enforcement to conduct a limited search of a cell phone's caller ID, contact information, and text messages, incident to arrest to look for evidence of the crime, is reasonable under the Fourth Amendment. *Accord United States v. Ortiz*, 84 F.3d 977, 984 (C.A. 7, 1996) (holding that because of a pager's finite memory, incoming pages may destroy currently stored telephone numbers in a pager's memory, it is imperative for law enforcement officers to have the authority to immediately search or retrieve information from a pager, incident to a valid arrest, in order to prevent its destruction.); *United States v. Murphy*, 522 F.3d 405, 411 (C.A. 4, 2009), cert. denied, ___ U.S. ___, 129 S.Ct. 2016 (2009) (holding that law enforcement need not ascertain a cell phone's storage capacity in order to justify a warrantless search of that phone incident to arrest and rejecting the argument that the defendant had a heightened expectation of privacy in his cell phone because it was capable of storing a large amount of information).

Similarly, in *United States v. Wurie*, 612 F. Supp. 2d 104 (D. Mass. 2009), the District Court held that, as a matter of first impression, the search of a defendant's cell phone incident to his arrest is

reasonable where the arrest is lawful and the search is conducted to preserve evidence and seize contraband. In *Wurie*, law enforcement arrested the defendant for distributing cocaine. In the course of his arrest, officers seized two cell phones from his person. The officers observed numerous calls logged on the caller ID screen from "my house". The officers observed the phone number attributed to "my house" and ran the number through anywho.com to see if they could obtain an address. The officers did not access any other stored information. The *Wurie* court held, after conducting a thorough review of other federal cases addressing the search of a cell phone, that the search of the caller ID was limited and reasonable, because the officers reasonably believed that the stored telephone number would lead them to the location of the defendant's suspected drug inventory.

While there is no decision on the issue from either the Ohio District Courts or the Sixth Circuit Court of Appeals, it is important to note that both Tennessee and Kentucky District Courts have upheld searches of cell phones. In *United States v. Ajan*, Nos. 2:02-CR-71, 2:06-CV-24, 2009 WL 1421183 (E.D. Tenn. May 20, 2009), the District Court adopted the reasoning of the Fifth Circuit in *Finley*, supra. *Id.* at *10. In *United States v. Dennis*, No. 07-008-DLB, 2007 WL 3400500 (E.D. Ky. Nov. 13, 2007), the District Court, also adopted the holding in *Finley* and held that the information retrieved from the cell phone was acquired from a valid search incident to arrest, and is no different from any other type of evidence seized incident to arrest. *Id.* at *7.

In *United States v. Parada*, 289 F. Supp. 2d 1291, 1304 (D. Kan. 2003), the District Court held that

exigent circumstances justified the retrieval of incoming phone calls stored in the memory of the defendant's phone because a cell phone has a limited memory to store numbers. The *Parada* court further held that recorded phone numbers in a cellular phone's memory are not the contents of a communication. Very recently, the Supreme Court of Connecticut affirmed the warrantless search of a cellular phone, as a container pursuant to the automobile exception of the warrant requirement, as the officers demonstrated probable cause to believe the cell phone contained evidence of drug activity and the cell phone was found on the front seat of the defendant's car when he was arrested. *State v. Boyd*, SC 17719, 295 Conn. 707, 2010 WL 1526467 (Conn. Apr. 27, 2010).

On the other hand, the District Court for the Northern District of California, rejected *Finley*, and held that because modern cell phones have the capacity for storing an immense amount of private information, arrestees have significant privacy interests in the contents of their cellular phones. *United States v. Park*, N.D. Cal. No. CR 05-375 SI, 2007 WL 1521573 (N.D. Cal. May 23, 2007). *Accord United States v. Wall*, No. 08-60016-CR-ZLOCH, 2008 WL 5381412 (S.D. Fla. Dec. 22, 2008).

Thus, law enforcement agencies across the nation are now subject to inconsistent mandates as to when a cellular phone may be searched incident to the lawful arrest of a suspect.

II. This is an issue of great importance. In the past twenty years, cellular phones have evolved from novel to commonplace, with a majority of Americans carrying them. Further, more and more criminals are using cellular phones to commit crimes. Only this Court can properly determine what constitutes reasonable exceptions to the Fourth Amendment in the digital age.

Even if this Court finds that a cellular phone is not the equivalent of a closed container, the police were entitled to search the cellular phone to prevent the destruction of evidence. It is common knowledge that a cellular phone's caller ID only holds a finite number of calls in its memory. Unlike a personal computer's hard drive, where deleted information can typically be recovered by experts, cell phone memory capabilities are much different, and once an item is deleted it is gone forever. More troubling for the preservation of evidence is the technology that permits cell phone subscribers to remotely access their cell phone information over the internet and delete messages and information contained on the phone. Further, officers could not control the number of calls the Defendant's phone would receive between arrest and the time it took to obtain a warrant. It is further established that this Defendant conducted his trafficking with the witness over his cell phone. It is likely then that he conducted his business with other people in a similar fashion. Therefore, the police needed to search the phone and document the controlled call on the phone before it was deleted by further incoming calls.

Likewise, in *United States v. Valdez*, No. 06-CR-336, 2008 WL 360548 (E.D. Wis. Feb. 8, 2008), the District Court upheld a limited, warrantless search of a cell phone's address book and call history, incident to arrest, in order to preserve the evidence from destruction. The *Valdez* court reasoned that the search of a cell phone's address book and call history is very much like the search of a pager. *Id.* at *2. The *Valdez* court applied the reasoning of the Seventh Circuit Court of Appeals, which held in examining a warrantless search of a pager, that "[a]n officer's need to preserve evidence is an important law enforcement component of the rationale for permitting a search of a suspect incident to a valid arrest. Because of the finite nature of a pager's electronic memory, incoming pages may destroy currently stored telephone numbers in a pager's memory. The contents of some pagers also can be destroyed merely by turning off the power or touching a button. Thus, it is imperative that law enforcement officers have the authority to immediately "search" or retrieve, incident to a valid arrest, information from a pager in order to prevent its destruction as evidence." *United States v. Ortiz,* 84 F.3d 977, 984 (C.A. 7, 1996). In so holding, the *Valdez* court rejected the argument that the evidence obtained from the phone should be suppressed under *United States v. Park,* No. CR 05-375, 2007 WL 1521573 (N.D. Cal. May 23, 2007), because the search was limited in nature and in scope and done to preserve evidence that could be lost by incoming calls.

The *Valdez* court also noted that this Court has held that there is no legitimate expectation of privacy in phone numbers one dials. "We doubt that people in general entertain any actual expectation of privacy in the numbers they dial. All telephone users realize that

they must 'convey' phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed. All subscribers realize, moreover, that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills." *Smith v. Maryland*, 442 U.S. 735, 742, 99 S. Ct. 2577, 2581 (1979).

The State submits that the logic of this Court in *Smith v. Maryland*, supra, is instructive as applied to the case at bar in crafting a reasonable and narrowly tailored law which allows for the preservation of evidence by law enforcement and protects the privacy interests of individuals. Under *Smith v. Maryland*, there is no expectation of privacy in phone numbers dialed because they are necessarily transmitted to the phone company, and are meaningless without that transfer. Thus, it is clear that any infringement into the privacy interest in a call log of a suspect under lawful arrest is reasonable. Further, when looking to the preservation of evidence, cell phone capabilities for storage are different than that of a personal computer, and cell phone memory is finite, so permitting the limited retrieval of contact information and text messages in searching for corroborating or probative evidence of a crime incident to arrest is reasonable. The approach championed by the State of Ohio alleviates any fears of the majority below, by keeping law enforcement's search limited and reasonable, while still protecting the privacy interest of an individual.

III. The decision of the Ohio Supreme Court is in error, and enacts a sweeping new Fourth Amendment rule based upon the abstract capabilities of a cell phone, which is at odds with this Court's previous holdings. Further, the Ohio Supreme Court has refused to consider whether the application of the exclusionary rule is warranted and the reasonableness of the officer's conduct.

The decision of the Ohio Supreme Court is in error as it reads into *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860 (1981), the requirement that in order for an object to be a container, it must contain a tangible object. This requirement is not consistent with the ruling in *Belton,* which recognized that containers will sometime be such that they could neither hold a weapon or evidence of the criminal conduct for which the suspect was arrested. *Id.* at 461. Further, *Belton* was decided in 1981, before cellular phones could fit in your pocket and before cellular phones were widely used. It is further hard to imagine in this day and age that digital evidence of a crime is not an object to be retrieved from a "container". Thus, the Ohio Supreme Court's decision needlessly eviscerates the Fourth Amendment exception to search a suspect incident to arrest in order to preserve evidence.

Moreover, the application of the Exclusionary Rule is unnecessary in the warrantless search of a cellular phone where the record demonstrates that officers had probable cause to believe the cellular phone found on the suspect incident to lawful arrest contained evidence of the crime for which he was arrested. Further, the Defendant was not prejudiced by the

introduction of the evidence obtained from the search. In *Herring v. United States*, 129 S. Ct. 695 (2009), this Court held that the application of the Exclusionary Rule to a Fourth Amendment violation is not automatic. The Majority further noted that when a Fourth Amendment determination was made upon a reasonable but mistaken assumption, the person subjected to the search is not necessarily the victim of a constitutional violation. *Id.* at 699.

In reaffirming that the application of the exclusionary rule must be limited to those cases that are sufficiently deliberate that exclusion can meaningfully deter it, or sufficiently culpable that such deterrence is worth the price paid by the justice system, the *Herring* majority noted, "We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence....[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs.....The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free-something that 'offends basic concepts of the criminal justice system.'...[T]he rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application." *Herring*, supra, at 700-701 (internal citations omitted).

In the case at bar, the police reasonably searched the Defendant and all containers found on his person incident to arrest. The fact that a cellular phone's status as a container was not settled at the time does not render the search unreasonable. Federal Courts of Appeal had previously held that an officer could search

a pager incident to arrest, so it is reasonable to assume that a cellular phone, particularly a basic cellular phone as here, would fall into the same category. See *State v. Smith*, supra at ¶ 20. Moreover, as previously stated, Judges and Justices across the country cannot even agree on the status of a cellular phone as a container. The Second District Court of Appeals held 2-1 it is a container, the Ohio Supreme Court split 4-3 that it was not, and the Federal District Courts that have considered the issue are split. When the highest legal minds of our community are at odds on this issue, it simply cannot be held that a police officer is deliberately or recklessly engaging in police misconduct worthy of the exclusionary rule's drastic application.

Furthermore, the Defendant has never established how the introduction of this evidence was prejudicial to him at trial. See *State v. Martinez*, Shelby County App. No. 13-04-49, 2006-Ohio-2002. The confidential informant in the case at bar testified at trial that she arranged the purchase of drugs with the Defendant over the phone. She had previously purchased drugs from him and recognized him on site. Since the introduction of the evidence of the Defendant's call log demonstrating the call from the informant was purely corroborative and cumulative, the Defendant cannot demonstrate prejudice, and his conviction must be affirmed.

CONCLUSION

The Defendant in this case was the subject of a valid arrest. Therefore, police were not required to get a warrant to search his person, and any containers found therein, incident to his arrest. The Defendant

had a cell phone on his person which is analogous to a closed container. Incident to his arrest, police officers were able to conduct a limited search of the cell phone's caller ID without a warrant to look for evidence of the informant's calls on the Defendant's cell phone. Moreover, a cell phone only stores a finite number of calls in its memory, and thus, the search was reasonable to preserve evidence. Therefore, the trial court properly overruled the Defendant's motion to suppress the contents of the caller ID from his cellular phone, and admitted it into evidence.

For the foregoing reasons, the Petitioner State of Ohio respectfully requests this Court grant its petition for a writ of certiorari.

Respectfully Submitted,

PROSECUTING ATTORNEY,
GREENE COUNTY, OHIO

STEPHEN K. HALLER (#0009172)
PROSECUTING ATTORNEY
Counsel of Record
Elizabeth A. Ellis (#0074332)
Assistant Prosecuting Attorney
61 Greene Street, Second Floor
Xenia, OH 45385
(937) 562-5250
shaller@co.greene.oh.us

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A: Opinion and Judgment, Ohio Supreme Court, filed December 15, 2009 ..... 1a

Appendix B: Opinion, Court of Appeals, filed July 25, 2008 ..... 21a

Appendix C: Judgment Entry, In the Common Pleas Court of Greene County, Ohio, filed April 26, 2007 ..... 44a

Appendix D: Judgment Entry, In the Common Pleas Court of Greene County, Ohio, filed April 11, 2007 ..... 50a

Appendix E: Reconsideration Entry, Ohio Supreme Court, filed February 10, 2010 ..... 59a

APPENDIX A

[Cite as *State v. Smith*, 124 Ohio St.3d 163, 2009-Ohio-6426.]

SUPREME COURT OF OHIO

No. 2008-1781

[Filed December 15, 2009]

THE STATE OF OHIO,	)
APPELLEE,	)
	)
v.	)
	)
SMITH,	)
APPELLANT.	)
	)

Search and seizure — Search incident to arrest — Data stored in cell phone carried by arrestee.

(Submitted September 15, 2009 — Decided December 15, 2009.)

APPEAL from the Court of Appeals for Greene County, No. 07-CA-47, 2008-Ohio-3717.

SYLLABUS OF THE COURT

The warrantless search of data within a cell phone seized incident to a lawful arrest is prohibited by the Fourth Amendment when the search is unnecessary for the safety of law-enforcement officers and there are no exigent circumstances.

LANZINGER, J.

{¶ 1} In this appeal concerning the scope of federal protection against unreasonable searches and seizures, we are asked to determine whether the Fourth Amendment to the United States Constitution prohibits the warrantless search of data within a cell phone when the phone is lawfully seized incident to an arrest. Given the particular facts of this case, we hold that the trial court improperly admitted the call record and phone numbers from appellant's phone. We therefore reverse and remand to the trial court for a new trial.

I. Case Background

{¶ 2} On January 21, 2007, Wendy Thomas Northern was transported to Miami Valley Hospital after a reported drug overdose. While at the hospital, she was questioned by Beavercreek police. Northern agreed to call her drug dealer, whom she identified as appellant, Antwaun Smith, to arrange for the purchase of crack cocaine at her residence. Beavercreek police

recorded the cell phone conversations between Northern and Smith arranging for the purchase.

{¶ 3} That evening, the Beavercreek police arrested Smith at Northern's residence. During the arrest, police searched Smith and found a cell phone on his person. The arresting officer put the cell phone in his pocket and placed Smith in a cruiser, then searched the scene for evidence. Later, police recovered bags containing crack cocaine at the scene.

{¶ 4} While the record does not show exactly when they first searched Smith's cell phone, at some point police discovered that the call records and phone numbers confirmed that Smith's cell phone had been used to speak with Northern. There was testimony that at least a portion of the search took place when officers returned to the police station and were booking into evidence the items seized from the crime scene. The police did not have either a warrant or Smith's consent to search the phone.

{¶ 5} Smith was indicted on one count of trafficking in cocaine in violation of R.C. 2925.03(A), two counts of possession of criminal tools in violation of R.C. 2923.24(A), one count of possession of cocaine in violation of R.C. 2925.11(A), and one count of tampering with evidence in violation of R.C. 2921.12(A)(1). He filed a pretrial motion to suppress evidence, objecting in part to the warrantless search of his cell phone. The trial court conducted a hearing and informed the parties that it would issue a decision when the state offered the evidence at trial.

{¶ 6} During trial, the trial court ruled that it would permit testimony regarding the cell phone's call

records and phone numbers but would not allow use of photographs that had been discovered in the phone. The trial court based its decision on a decision from the United States Court of Appeals for the Fifth Circuit, in which cell phones were likened to containers found on an arrestee's person and subject to search for the preservation of evidence for use at trial. *United States v. Finley* (C.A.5, 2007), 477 F.3d 250.

{¶ 7} A jury found Smith guilty on all counts. After finding that the possession of and trafficking in cocaine were allied offenses of similar import, the trial court merged them for a single conviction and sentenced Smith on all four counts to an aggregate sentence of 12 years' imprisonment, a $10,000 fine, and five years of mandatory postrelease control.

{¶ 8} Smith appealed, arguing in part that the trial court had erred in refusing to suppress the evidence found on his cell phone. *State v. Smith*, Greene App. No. 07-CA-47, 2008-Ohio-3717, at ¶ 36. After agreeing with the trial court that *Finley* was correct, the court of appeals overruled the assignment of error, holding that the trial court had not erred in refusing to grant the motion to suppress. Id. at ¶ 46-48. Judge Donovan dissented, citing *United States v. Park* (N.D.Cal.2007), No. CR 05-375 SI, 2007 WL 1521573, and asserting that the data retrieved from the phone should have been suppressed as the result of an unreasonable warrantless search. *State v. Smith*, 2008-Ohio-3717, at ¶ 63-65.

{¶ 9} We accepted jurisdiction over Smith's discretionary appeal and the proposition that the Fourth Amendment prohibits the warrantless search of contents of a cellular telephone when it is seized

incident to a valid arrest. *State v. Smith*, 120 Ohio St.3d 1486, 2009-Ohio-278, 900 N.E.2d 197.

II. Legal Analysis

A. The Fourth Amendment Preference for a Warrant

{¶ 10} Smith bases his challenge on the Fourth Amendment to the United States Constitution, which provides protection against unreasonable searches and seizures.[1] It is well established that searches conducted without a warrant are per se unreasonable, subject to certain "jealously and carefully drawn" exceptions. *Jones v. United States* (1958), 357 U.S. 493, 499, 78 S.Ct. 1253, 2 L.Ed.2d 1514; *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 454-455, 91 S.Ct. 2022, 29 L.Ed.2d 564.

{¶ 11} The exception that the state relies on is the search incident to arrest, which allows officers to conduct a search that includes an arrestee's person and the area within the arrestee's immediate control. *Chimel v. California* (1969), 395 U.S. 752, 762-763, 89

---

1 While Smith has not raised a challenge based upon the Ohio Constitution, we note that the language of Section 14, Article I of the Ohio Constitution is virtually identical to the language of the Fourth Amendment and that this court has accordingly interpreted Section 14, Article I of the Ohio Constitution as affording the same protection as the Fourth Amendment in felony cases. *State v. Robinette* (1997), 80 Ohio St.3d 234, 238–239, 685 N.E.2d 762. In *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175, however, we held that Section 14, Article I affords greater protection than the Fourth Amendment against warrantless arrests for minor misdemeanors.

S.Ct. 2034, 23 L.Ed.2d 685. This exception "derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Arizona v. Gant* (2009), 556 U.S. , 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485, 493, citing *United States v. Robinson* (1973), 414 U.S. 218, 230-234, 94 S.Ct. 467, 38 L.Ed.2d 427, and *Chimel v. California*, 395 U.S. at 763.

{¶ 12} These searches need not necessarily be conducted at the moment of arrest. The United States Supreme Court has held that "searches and seizures that could be made on the spot at the time of the arrest may legally be conducted later when the accused arrives at the place of detention." *United States v. Edwards* (1974), 415 U.S. 800, 803, 94 S.Ct. 1234, 39 L.Ed.2d 771. But when the interests in officer safety and evidence preservation are minimized, the court has held that this exception no longer applies. *United States v. Chadwick* (1977), 433 U.S. 1, 15, 97 S.Ct. 2476, 53 L.Ed.2d 538, abrogated on other grounds by *California v. Acevedo* (1991), 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619.

{¶ 13} Searches may also extend to the personal effects of an arrestee. We have held that the search of a purse is reasonable under the Fourth Amendment in certain circumstances, *State v. Mathews* (1976), 46 Ohio St.2d 72, 75 O.O.2d 150, 346 N.E.2d 151, and the United States Supreme Court has held that it is reasonable for police to search any container or article on a defendant's person—including a shoulder bag—in accordance with established inventory procedures. *Illinois v. Lafayette* (1983), 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65. We must determine whether the

police may search data within an arrestee's cell phone without a warrant.

B. Characterization of a cell phone

{¶ 14} The question in this case is a novel one. In part, whether the warrantless search of a cell phone passes constitutional muster depends upon how a cell phone is characterized because whether a search is determined to be reasonable is always fact-driven. It appears that neither the United States Supreme Court nor any state supreme court has ruled on the warrantless cell phone search.[2] At present, the two leading cases are those discussed by the majority and dissenting opinions of the court of appeals.

1. The Approach of *United States v. Finley*

{¶ 15} In *United States v. Finley* (C.A.5, 2007), 477 F.3d 250, the Fifth Circuit upheld the district court's denial of defendant's motion to suppress call records and text messages retrieved from his cell phone. Id. at 260. Finley was arrested during a traffic stop after a passenger in his van sold methamphetamine to an informant. During the search incident to the arrest, police found a cell phone in Finley's pocket. He was taken along with his passenger to the passenger's house, where other officers were conducting a search. While Finley was being questioned there, officers examined the cell phone's call records and text

---

2. A case concerning the validity of a warrantless search of a cell phone is currently before the Supreme Court of California, but no opinion has been issued in that case at the time of this decision. See *People v. Diaz* (2008), 85 Cal.Rptr.3d 693, 196 P.3d 220.

messages, finding evidence that appeared to be related to narcotics use and drug trafficking. Id. at 254.

{¶ 16} In upholding the search, the Fifth Circuit analogized Finley's cell phone to a closed container found on an arrestee's person, which may be searched. Id. at 259-260.[3] Notably, Finley had conceded that a cell phone was analogous to a closed container. Id. at 260. He chose to rely on a case in which the Supreme Court had held that the defendants' Fourth Amendment rights were violated when the FBI viewed without a warrant films it had acquired from a private third party to whom they had been mistakenly delivered by a carrier. *Walter v. United States* (1980), 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410. The Fifth Circuit rejected Finley's argument, noting that *Walter* did not involve a search incident to an arrest, an exception to the warrant requirement, and so was inapposite. *Finley*, 477 F.3d at 260. Because Smith does not concede here that a cell phone is analogous to a closed container, the analysis in *Finley* is not entirely applicable.

2. The Approach of *United States v. Park*

{¶ 17} The United States District Court for the Northern District of California, disagreeing with the Fifth Circuit's decision in *Finley*, granted a defendant's motion to suppress the warrantless search of his cell phone. *United States v. Park* (May 23, 2007), N.D.Cal. No. CR 05-375 SI, 2007 WL 1521573. Police officers

---

3. The decision in *Finley* has been followed by the Fourth Circuit Court of Appeals in *United States v. Young* (C.A. 4, 2008), 278 Fed.Appx. 242, 2008 WL 2076380.

observed Park entering and leaving a building that they had under surveillance and for which they had obtained a search warrant. When they executed the warrant and searched the building, they found evidence of an indoor marijuana-cultivation operation. They arrested Park and took him to booking, where they searched him and found a cell phone. Before turning over the cell phone to the booking officer, the arresting officer recorded names and phone numbers found in Park's cell phone.

{¶ 18} This district court reasoned that modern cell phones "have the capacity for storing immense amounts of private information" and thus likened the devices to laptop computers, in which arrestees have significant privacy interests, rather than address books or pagers found on their persons, in which they have lesser privacy interests. *Park*, 2007 WL 1521573, *8.[4] Because the search of the cell phone's contents was not conducted out of concern for the officer's safety or to preserve evidence, the court found that it did not fall under the search-incident-to-arrest exception and that the officers should have obtained a warrant to conduct the search. Id.

---

4. The United States District Court for the District of Maine has attempted to reconcile the holdings in *Finley* and *Park* by noting that in *Finley*, the search of the cell phone was "substantially contemporaneous" with the defendant's arrest, while the search and arrest in *Park* were not "substantially contemporaneous." *United States v. Curry* (Jan. 23, 2008), D.Maine No. 07-100-P-H, 2008 WL 219966, *8-9.

3. Closed Containers

{¶ 19} The state argues that we should follow *Finley* and affirm the court of appeals because the trial court was correct in its conclusion that a cell phone is akin to a closed container and is thus subject to search upon a lawful arrest. We do not agree with this comparison. Objects falling under the banner of "closed container" have traditionally been physical objects capable of holding other physical objects. Indeed, the United States Supreme Court has stated that in this situation, "container" means "any object capable of holding another object." *New York v. Belton* (1981), 453 U.S. 454, 460, 101 S.Ct. 2860, 69 L.Ed.2d 768, fn. 4. One such example is a cigarette package containing drugs found in a person's pocket, as in *United States v. Robinson* (1973), 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427.

{¶ 20} We acknowledge that some federal courts have likened electronic devices to closed containers. See, e.g., *United States v. Chan* (N.D.Cal.1993), 830 F.Supp. 531, 534 (finding that a pager is analogous to a closed container), *United States v. Ortiz* (C.A.7, 1996), 84 F.3d 977, 984 (following *Chan* in holding that a pager is a closed container), *United States v. David* (D.Nev.1991), 756 F.Supp. 1385, 1390 (finding a computer memo book "indistinguishable from any other closed container"). Each of these cases, however, fails to consider the Supreme Court's definition of "container" in *Belton*, which implies that the container must actually have a physical object within it. Additionally, the pagers and computer memo books of the early and mid 1990s bear little resemblance to the cell phones of today. Even the more basic models of modern cell phones are capable of storing a wealth of

digitized information wholly unlike any physical object found within a closed container. We thus hold that a cell phone is not a closed container for purposes of a Fourth Amendment analysis.

4. Legitimate Expectation of Privacy

{¶ 21} Since cell phones are not closed containers, the question becomes how they should be classified. Given the continuing rapid advancements in cell phone technology, we acknowledge that there are legitimate concerns regarding the effect of allowing warrantless searches of cell phones, especially so-called smart phones, which allow for high-speed Internet access and are capable of storing tremendous amounts of private data.[5] While it is apparent from the record that Smith's cell phone could not be called a smart phone with advanced technological capability, it is clear from the record that Smith's cell phone had phone, text messaging, and camera capabilities. While the dissent argues that Smith's phone is merely a "conventional one," we note that in today's advanced technological age many "standard" cell phones include a variety of features above and beyond the ability to place phone calls. Indeed, like Smith's phone, many cell phones give users the ability to send text messages and take pictures. Other modern "standard" cell phones can also store and transfer data and allow users to connect to the Internet. Because basic cell phones in today's world have a wide variety of possible functions, it

---

5. For detailed discussion of the capabilities of modern cell phones and potential Fourth Amendment concerns, see generally Gershowitz, The iPhone Meets the Fourth Amendment (2008), 56 UCLA L.Rev. 27, and Stillwagon, Note, Bringing an End to Warrantless Cell Phone Searches (2008), 42 Ga.L.Rev. 1165.

would not be helpful to create a rule that requires officers to discern the capabilities of a cell phone before acting accordingly.

{¶ 22} "Modern understandings of the Fourth Amendment recognize that it serves to protect an individual's subjective expectation of privacy if that expectation is reasonable and justifiable." *State v. Buzzard*, 112 Ohio St.3d 451, 2007-Ohio-373, 860 N.E.2d 1006, ¶ 14, citing *Rakas v. Illinois* (1978), 439 U.S. 128, 143, 99 S.Ct. 421, 58 L.Ed.2d 387, and *Katz v. United States* (1967), 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2d 576 (Harlan, J., concurring). Given their unique nature as multifunctional tools, cell phones defy easy categorization. On one hand, they contain digital address books very much akin to traditional address books carried on the person, which are entitled to a lower expectation of privacy in a search incident to an arrest. On the other hand, they have the ability to transmit large amounts of data in various forms, likening them to laptop computers, which are entitled to a higher expectation of privacy.

{¶ 23} But cell phones are neither address books nor laptop computers. They are more intricate and multifunctional than traditional address books, yet they are still, in essence, phones, which makes them distinguishable from laptop computers. Although cell phones cannot be equated with laptop computers, their ability to store large amounts of private data gives their users a reasonable and justifiable expectation of a higher level of privacy in the information they contain. Once the cell phone is in police custody, the state has satisfied its immediate interest in collecting and preserving evidence and can take preventive steps to ensure that the data found on the phone are neither

lost nor erased. But because a person has a high expectation of privacy in a cell phone's contents, police must then obtain a warrant before intruding into the phone's contents.

{¶ 24} Although the dissent maintains that this case can be decided on the basis of traditional Fourth Amendment principles governing searches incident to arrest, the dissent fails to recognize that the justifications behind allowing a search incident to arrest are officer safety and the preservation of evidence. There is no evidence that either justification was present in this case. A search of the cell phone's contents was not necessary to ensure officer safety, and the state failed to present any evidence that the call records and phone numbers were subject to imminent destruction. We therefore hold that because a cell phone is not a closed container, and because an individual has a privacy interest in the contents of a cell phone that goes beyond the privacy interest in an address book or pager, an officer may not conduct a search of a cell phone's contents incident to a lawful arrest without first obtaining a warrant.

C. Remaining state arguments

{¶ 25} The state raises two additional arguments supporting its belief that the trial court properly admitted the evidence obtained during the warrantless search of Smith's phone. First, it argues that the search of the cell phone was proper because exigent circumstances justified the search. "Once a warrantless search is established, the burden of persuasion is on the state to show the validity of the search." *Xenia v. Wallace* (1988), 37 Ohio St.3d 216, 218, 524 N.E.2d 889, citing *State v. Kessler* (1978), 53

Ohio St.2d 204, 207, 7 O.O.3d 375, 373 N.E.2d 1252. In its brief, the state argues that cell phones store a finite number of calls in their memory and that once these records have been deleted, they cannot be recovered. We conclude that because the state failed to raise this argument below, the issue is not properly before us. At the suppression hearing, the state offered no evidence or argument to support its claim that the search was justified by the need to preserve evidence. The state having failed to make any showing at the trial court that exigent circumstances existed, we are now unable to conclude that they were present. Additionally, even if one accepts the premise that the call records on Smith's phone were subject to imminent permanent deletion, the state failed to show that it would be unable to obtain call records from the cell phone service provider, which might possibly maintain such records as part of its normal operating procedures.

{¶ 26} Finally, the state also asserts that the evidence of call records and phone numbers is helpful to police to ensure the correct identification of the suspect. The facts in the record belie this argument. The police did not testify that the call records and phone numbers were helpful in identifying Smith. To the contrary, Beavercreek police officers testified that they had checked records on Smith and retrieved his photograph from the Bureau of Motor Vehicles, which they showed to Northern, who confirmed Smith's identity as her drug dealer. The photograph and a description of the vehicle in which Smith was riding were also provided to officers before they arrived at Northern's residence. The officers were also familiar with Smith because they had recently arrested him near Northern's residence. When they arrested him again, the officers relied upon the vehicle description

and BMV photograph to identify Smith. The record thus indicates that the officers did not rely upon the warrantless search of the cell phone to identity Smith.

{¶ 27} While there may be some instances in which a warrantless search of a cell phone is necessary to identify a suspect, we do not address this argument here, because the officers in this case did not, in fact, rely upon the call records and phone numbers to identify the suspect.

III. Conclusion

{¶ 28} Recognizing that Fourth Amendment search-and-seizure questions are particularly dependent upon the facts present in each particular case, we conclude that in this case, the trial court improperly admitted the call record and phone numbers from appellant's cell phone.

{¶ 29} We hold that the warrantless search of data within a cell phone seized incident to a lawful arrest is prohibited by the Fourth Amendment when the search is unnecessary for the safety of law-enforcement officers and there are no exigent circumstances. Because the state failed to show that either of these exceptions to the warrant requirement applied, the search of Smith's cell phone was improper and the trial court was required to exclude from evidence the call records and phone numbers taken from the cell phone. We accordingly reverse the judgment of the court of appeals and remand to the trial court for proceedings consistent with this opinion.

Judgment reversed
and cause remanded.

MOYER, C.J., and PFEIFER and O'CONNOR, JJ., concur.

LUNDBERG STRATTON, O'DONNELL, and CUPP, JJ., dissent.

CUPP, J., dissenting.

{¶ 30} I dissent from the majority's decision. The majority needlessly embarks upon a review of cell phone capabilities in the abstract in order to announce a sweeping new Fourth Amendment rule that is at odds with decisions of other courts that have addressed similar questions.

{¶ 31} In my view, this case deals with a straightforward, well-established principle: "[I]n the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *United States v. Robinson* (1973), 414 U.S. 218, 235, 94 S.Ct. 467, 38 L.Ed.2d 427. In *Robinson*, the United States Supreme Court upheld admission into evidence of a cigarette package containing drugs, which was found as part of a search incident to Robinson's arrest. See also *Gustafson v. Florida* (1973), 414 U.S. 260, 265-266, 94 S.Ct. 488, 38 L.Ed.2d 456 (upholding police's inspection of a box of cigarettes found during search of defendant incident to his arrest). And as in *United States v. Edwards* (1974), 415 U.S. 800, 803, 94 S.Ct. 1234, 39 L.Ed.2d 771, "searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention."

{¶ 32} In this case, there is no dispute that the arrest of Smith was lawful. During the search of Smith incident to his arrest for drug trafficking and other offenses, the officers located his cell phone on his person. There is no evidence that this phone was anything other than a conventional one, rather than a "smart phone" with advanced technological capability.

{¶ 33} The police later (at the police station) searched Smith's cell phone's address book and call list. As the majority opinion recognizes, a cell phone's digital address book is akin to traditional address books carried on the person. Courts have upheld police officers' search of an address book found on an arrestee's person during a search incident to a lawful arrest. See, e.g., *United States v. Rodriguez* (C.A.7, 1993), 995 F.2d 776, 778. The phone's call list is similar, showing a list of telephone numbers that called to or were called from the phone.

{¶ 34} Thus, I would hold that the search here—which resembles police officers' search of a traditional address book found on the person of an arrestee during a search incident to arrest—is permissible under the Fourth Amendment. This conclusion is consistent with the approach taken by several federal courts of appeals. See *United States v. Finley* (C.A.5, 2007), 477 F.3d 250, 260 (cell phone search); *United States v. Murphy* (C.A.4, 2009), 552 F.3d 405, 411 (cell phone search); *United States v. Ortiz* (C.A.7, 1996), 84 F.3d 977, 984 (pager search).

{¶ 35} It would be unworkable to devise a rule that required police to determine the particular cell phone's storage capacity, and the concomitant risk that telephone numbers stored on the phone could be lost

over time, before searching the phone's address book or call list. I would hold that a search of an arrestee's cell phone's address book and call list is permissible as part of a search incident to arrest without first requiring police to determine the cell phone's storage capabilities.

{¶ 36} Because this case can be decided on the basis of traditional Fourth Amendment principles governing searches of the person incident to arrest, I see no need here to delve into a wide-ranging examination of the capabilities of different types of cell phones and other electronic devices, as the majority does. The majority bases its broad holdings on its estimation of the possible capabilities of other cell phones and computers. But here, only the address book and call records were admitted into evidence. The issue of a more in-depth warrantless search of "data within a cell phone" is not before us. I would leave for another day, to a case that factually raises the issue directly, the question of whether police may perform more in-depth searches of information on cell phones that have capabilities akin to a computer.

{¶ 37} For these reasons, I dissent.

LUNDBERG STRATTON and O'DONNELL, JJ., concur in the foregoing opinion.

Stephen K. Haller, Greene County Prosecuting Attorney, and Elizabeth A. Ellis, Assistant Prosecuting Attorney, for appellee.

Timothy Young, Ohio Public Defender, and Craig M. Jaquith, Assistant Public Defender, for appellant.

John D. Ferrero, Stark County Prosecuting Attorney, and Kathleen O. Tatarsky, Assistant Prosecuting Attorney, urging affirmance for amicus curiae Ohio Prosecuting Attorneys Association.

Jeffrey M. Gamso, Legal Director, and Carrie L. Davis, Staff Attorney, urging reversal for amicus curiae American Civil Liberties Union of Ohio Foundation, Inc.

THE SUPREME COURT
OF OHIO

Case No. 2008-1781

[Filed December 15, 2009]

State of Ohio	)
	)
v.	)
	)
Antwaun Smith	)
	)

JUDGMENT ENTRY

APPEAL FROM THE COURT OF APPEALS

This cause, here on appeal from the Court of Appeals for Greene County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is reversed and this cause is remanded to the trial court, consistent with the opinion rendered herein.

It is further ordered that a mandate be sent to the Court of Common Pleas for Greene County to carry this judgment into execution and that a copy of this entry be certified to the Clerk of the Court of Appeals for Greene County for entry.

(Greene County Court of Appeals; No. 07CA47)

/s/Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX B

THE OHIO COURT OF APPEALS

No. 07-CA47

[Filed July 25, 2008]

State of Ohio	)
Plaintiff-Appellee	)
	)
v.	)
	)
Antwaun Smith	)
Defendant-Appellant	)
	)

Stephen K. Haller, by Elizabeth A. Ellis, Greene County Prosecutor's Office, Xenia, OH, for plaintiff-appellee.

J. Allen Wilmes, Dayton, OH, for defendant-appellant.

KROGAN, J.

{¶ 1} Antwaun Smith appeals from his conviction for trafficking in cocaine, two counts of possession of criminal tools, possession of cocaine, and tampering with evidence.

{¶ 2} On January 21, 2007, Detective Craig Polston of the ACE Task Force received a call informing him that a large amount of crack cocaine was found in the

residence of a Wendy Northern in Beavercreek, Ohio. Ms. Northern had been transported to Miami Valley Hospital as a result of a possible drug overdose. Detectives Polston and Scott Molnar responded to the hospital to interview Ms. Northern. While at the hospital, Ms. Northern was asked about her drug supplier and if she would cooperate with detectives and place phone calls to her supplier to set up a controlled buy. Ms. Northern agreed to cooperate. Ms. Northern told detectives that her drug supplier, to whom she referred as "Capo" or Antwaun, had been riding as a passenger in a vehicle a few weeks earlier that had been stopped down the street from her home, and was cited for possessing a small amount of marijuana. Polston pulled the information from the traffic stop (including vehicle type, color, make and model) and subsequent arrest and learned the identity of the passenger to be Smith. Polston then showed a BMV photo of Smith to Northern, and she identified Smith as her drug supplier. The detectives took Ms. Northern to the police station to get a written statement and to get her to place some controlled phone calls. Detective Polston asked Ms. Northen to call Capo and request an ounce of crack cocaine. They further asked her to tell Smith to bring the cocaine to her house because she did not have access to transportation. She complied, and the police recorded the conversation. During the phone conversation, Smith agreed to come to Ms. Northern's home to deliver an ounce of crack cocaine. Smith did not show up until much later than expected and while Ms. Northern was being transported back to the Greene County jail, she received a call from Smith telling her that he was in her driveway. This information was immediately relayed to other police officers on the scene.

{¶ 3} While in the driveway of the home, Smith and his two passengers were ordered out of the vehicle at gunpoint. Officer Shawn Williams ordered Smith to walk diagonally back toward his voice. When ordered to put his hands up, Smith did not initially comply. (Tr. 208-209.) Officer Williams testified there was "a good two to four second time span" where Smith's hands weren't visible. (Tr. 212.) Smith "took a few shuffle steps back with his hands where [Officer Williams] still could not see [his hands]." (Tr. 214-215.) During this time, there were three to six inches of snow on the ground and it was dark outside. (Tr. 216.) No crack cocaine was found on Smith's person at the time of his arrest. Crack cocaine was ultimately discovered two hours later under the snow in a footprint left by Smith when he exited the vehicle. Smith was arrested at the scene. The officers searched Smith incident to his arrest and recovered $2,500 in cash and a cell phone. Police searched Smith's cell phone prior to booking him into jail, and it revealed that Smith had called Ms. Northern twice, once just before the police arrested him. Police also recovered a crack pipe, some digital scales and a marijuana blunt inside the vehicle Smith had been driving.

{¶ 4} Prior to trial, Smith moved to suppress the evidence discovered by the police on his cell phone. The trial court overruled Smith's motion upon the authority of *United States v. Finley (C.A.5, 2007)*, 477 F.3d 250, certiorari denied (2007), --- U.S. ----, 127 S.Ct. 2065, 167 L.Ed.2d 790, and admitted evidence of the call records and phone numbers retrieved from Smith's phone. Those records demonstrated that the number of the cell phone matched a number provided to the police by Ms. Northern. Furthermore, the cell

phone contained Ms. Northern's home phone number and cell phone numbers.

{¶ 5} This matter proceeded to a trial by jury on March 26, 2007, at the conclusion of which Smith was found guilty of one count of trafficking in cocaine, two counts of possession of criminal tools, one count of possession of cocaine, and one count of tampering with evidence. The court sentenced Smith to a total of 12 years imprisonment, of which eight years is a mandatory term.

{¶ 6} Smith has filed a timely appeal from this conviction and sentence, assigning the following errors for our review:

{¶ 7} I. "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ENTERING A FINDING OF GUILTY TO THE CHARGE OF AGGRAVATED TRAFFICKING IN CRACK COCAINE AND TO THE CHARGE OF TAMPERING WITH EVIDENCE WHEN SAID FINDING WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 8} II. "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ENTERING A FINDING OF GUILTY TO THE CHARGES OF POSSESSION OF AN ILLEGAL SUBSTANCE (CRACK COCAINE) AND TAMPERING WITH EVIDENCE WHICH VERDICT WAS NOT SUPPORTED BY EVIDENCE AND SO IS CONTRARY TO LAW."

{¶ 9} III. "DUE TO TRIAL COUNSEL'S FAILURE TO OBJECT TO IMPROPER QUESTIONS AND COMMENTS OF THE PROSECUTOR, APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF

COUNSEL AND THUS WAS DENIED A FAIR TRIAL HEREIN."

{¶ 10} IV. "COMMENTS BY THE PROSECUTOR BOTH DURING TESTIMONY AND DURING CLOSING ARGUMENT REPRESENTED MISCONDUCT AND SERVED TO DENY APPELLANT DUE PROCESS."

{¶ 11} V. "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO SUPPRESS THE USE OF CELL PHONE RECORDS ILLEGALLY SEIZED FROM APPELLANT."

I

{¶ 12} Smith argues his convictions for aggravated trafficking and tampering with evidence are against the manifest weight of the evidence. He contends the State failed to produce evidence that he sold or offered to sell crack cocaine to Wendy Northern. He argues that no one saw him in possession of crack cocaine or tamper with any evidence.

{¶ 13} We agree with the State that Smith's conviction for aggravated trafficking in cocaine is not against the manifest weight of the evidence. The jury heard the recorded conversation in which Smith agreed to provide the cocaine to Northern. R.C. 2925.03(A)(1) provides that no one shall knowingly sell or offer to sell a controlled substance. Crack cocaine is a controlled substance. Our review of the record demonstrates that Smith offered to sell an ounce of cocaine to Northern. We have listened to the recordings of Ms. Northern's cell phone conversations

with Smith held on January 21, 2007. The following statements can be gleaned from those conversations:

{¶ 14} Northern: "[mumbling]"

{¶ 15} Smith: "I'm still trying to get a way out there. If I do, what do you want me to do?"
¶ * *

{¶ 16} Northern: "[mumbling]"

{¶ 17} Smith: "You used to paying, you used to going * * * somebody else, getting it for lower, and I don't have it for that."
¶ * *

{¶ 18} Northern: "[mumbling] * * * can I get something?"

{¶ 19} Smith: "Yep, you know you can without even asking."

{¶ 20} Northern: "[mumbling]"

{¶ 21} Smith: "Uh, um, I'm going to try to make it to you."
¶ * *

{¶ 22} Northern: "[mumbling]"

{¶ 23} Smith: "Yeah, yeah, yeah, um, I got it. I'll have it for you. I gotta get a way out, I gotta get a way out there."

{¶ 24} Northern: "[mumbling]"

{¶ 25} Smith: "As soon as I get a way, a licensed driver, I'll bring it straight out there to you * * * I'll make sure I'll get it to you. I can get it out there to you today before 5:00."

{¶ 26} Northern: "[mumbling]"

{¶ 27} Smith: "I promise. Hey, you know I'm taking a hell of a risk, but I'm a doing this because of you."
¶ * *

{¶ 28} Tampering with evidence as provided in R.C. 2921.21(A)(1) states in part that no person knowing that an investigation is in progress shall alter, destroy, conceal or remove anything with purpose to impair its value or availability as evidence in such investigation. The State presented evidence that shortly after Smith offered to sell cocaine to Northern, he was arrested by the police at Northern's residence. There was circumstantial evidence that Smith dropped the cocaine in the snow before he could be taken into custody. These actions by Smith support his convictions for tampering with evidence and aggravated trafficking. *State v. Diana* (1976), 48 Ohio St.2d 199, 357 N.E.2d 1090. The Appellant's first assignment is Overruled.

II

{¶ 29} In his second assignment, Smith argues his conviction for possession of cocaine is based on insufficient evidence. Insufficient evidence is evidence which would raise a reasonable doubt of the defendant's guilt in the average mind of a juror. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492. The State presented circumstantial evidence that

Smith dropped the cocaine, recovered in the snow, in the area where he exited his vehicle. It was Smith who, after all, offered to sell the cocaine to Northern and he was about to deliver it to Northern when he was apprehended. Smith's conviction for possession of cocaine was based on sufficient evidence. The second assignment of error is likewise Overruled.

III

{¶ 30} In his third assignment, Smith contends his trial counsel was ineffective in failing to object to certain testimony presented by the State. Specifically, he contends his trial counsel should have objected to Wendy Northern's testimony that she had spent $70,000 on drugs and that drugs had ruined her life. The State argues that this testimony was not improper because the prosecutor was trying to establish Ms. Northern's relationship with Smith. We agree with Smith that the testimony was not particularly relevant. Ms. Northern testified she spent approximately $70,000 in the past year on crack cocaine, but purchased crack cocaine for three months before she met Smith. In any event, the jury undoubtedly knew that drug addicts spend enormous amounts of money to feed their addiction.

{¶ 31} Smith contends his trial counsel was also ineffective for not objecting to Detective Polston's testimony that Northern told him that Smith had been stopped in her neighborhood earlier and had been arrested for possession of marijuana. The State argues that this testimony was admissible under Evid.R. 404(B) to show the defendant's identity. Polston testified he used the information for the marijuana arrest to show a BMV photograph of Smith to

Northern to identify him as her drug supplier. We agree with Smith that this testimony was improper, but the jury was immediately informed that Smith's arrest for possession of marijuana should have no bearing on their decision.

{¶ 32} Smith argues his trial counsel should have objected to the unflattering "thug-like" photograph taken of him when he was arrested, and the testimony that police recovered a holster for a gun, digital scales, a crack pipe, and a marijuana blunt in the vehicle. Smith contends that since he did not own the vehicle he was driving, some of the items found in the vehicle should not have been the subject of the officer's testimony. The State argues that the outcome of the trial would not have been different had the items found in the car Smith was driving not been mentioned. We agree. The photograph taken of the defendant at the time of his arrest was relevant however unflattering it might have been.

{¶ 33} Finally, Smith contends his trial counsel should have objected to the prosecutor's statements in the rebuttal argument wherein he stated, "you have undoubtedly seen enough shows to know that if the police had done something, violation of Mr. Smith's rights, you wouldn't even know about the evidence." (Tr. 464.) The prosecutor was undoubtedly referring to defense counsel's argument that the police did not have a search warrant or consent from Smith as authority to search his cell phone. The prosecutor's response was not improper. Smith has failed to demonstrate that his trial counsel's performance fell below an objective standard of reasonableness or that, if he did err, the outcome of the trial would have been different but for those errors in judgment. *Strickland*

v. Washington (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. The Appellant's third assignment is also Overruled.

IV

{¶ 34} In his fourth assignment, Smith argues that the prosecutor engaged in misconduct in making certain remarks during the trial. Specifically, he contends the prosecutor bolstered the credibility of Ms. Northern by commenting "touche" when after Ms. Northern refused to identify Smith in the courtroom, she told the prosecutor she identified his voice on the audiotape and questioned why the prosecutor asked her to again identify Smith as her drug supplier. The prosecutor was merely commenting that Ms. Northern was correct in pointing out the question by the prosecutor was unnecessary.

{¶ 35} Next, Smith complains of the prosecutor's comment in final argument "is it beyond the realm of possibility that the defendant brought crack cocaine to a crack cocaine sale?" The State argues that the prosecutor was merely pointing out that Smith's presence at Ms. Northern's house was not happenstance, but in response to her request that he sell her the cocaine. We agree the remark was not improper. The fourth assignment of error is Overruled

V

{¶ 36} In his fifth assignment, Smith argues the trial court erred in refusing to suppress the evidence found on his cell phone. Specifically, Smith asserts that the police search of his cell phone was unreasonable because the police had ample

opportunity to obtain a search warrant for the contents of his cell phone.

{¶ 37} The trial court overruled Smith's motion upon the authority of *United States v. Finley (C.A.5, 2007)*, 477 F.3d 250, certiorari denied (2007), --- U.S. ----, 127 S.Ct. 2065, 167 L.Ed.2d 790. In *Finley*, the Fifth Circuit Court of Appeals upheld the warrantless search of the defendant's cell phone on facts that closely resemble those in the present matter. The police in *Finley* used a cooperating source to set up a drug buy. The defendant drove the seller, Mark Brown, to the appointed location, and the drug sale was completed with the seller who was seated in the front passenger seat. Finley drove away and was stopped by police who recovered drugs with Finley's name on a pill bottle and marked money used to purchase the drugs. Finley and Brown were both arrested, and Finley's cell phone was seized. Finley and Brown were then transported to Brown's residence where police were conducting a search pursuant to a warrant. At that location, police searched Finley's cell phone call records and messages, along with several of the text messages, which referred to narcotics trafficking.

{¶ 38} The court of appeals found the trial court properly denied Finley's motion to suppress the cell phone evidence. The court wrote as follows:

{¶ 39} "Although Finley has standing to challenge the retrieval of the call records and text messages from his cell phone, we conclude that the search was lawful. It is well settled that 'in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under

that Amendment.' *United States v. Robinson*, 414 U.S. 218, 235, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). Police officers are not constrained to search only for weapons or instruments of escape on the arrestee's person; they may also, without any additional justification, look for evidence of the arrestee's crime on his person in order to preserve it for use at trial. *See id.* at 233-34, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427. The permissible scope of a search incident to a lawful arrest extends to containers found on the arrestee's person. *United States v. Johnson*, 846 F.2d 279, 282 (5th Cir.1988) (per curiam); see, also, *New York v. Belton*, 453 U.S. 454, 460-61, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981) (holding that police may search containers, whether open or closed, located within arrestee's reach); *Robinson*, 414 U.S. at 223-24, 94 S.Ct. 467, 38 L.Ed.2d 427 (upholding search of closed cigarette package on arrestee's person).

{¶ 40} "Finley concedes that the officers' post-arrest seizure of his cell phone from his pocket was lawful, but he argues that, since a cell phone is analogous to a closed container, the police had no authority to examine the phone's contents without a warrant. He relies on *Walter v. United States*, 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980), for this proposition. *Walter*, however, is inapposite because in that case no exception to the warrant requirement applied, *see id.* at 657, 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410, whereas here no warrant was required since the search was conducted pursuant to a valid custodial arrest, *see Robinson*, 414 U.S. at 235, 94 S.Ct. 467, 38 L.Ed.2d 427. Special Agent Cook was therefore permitted to search Finley's cell phone pursuant to his arrest. *Cf. United States v. Ortiz*, 84 F.3d 977, 984 (7th Cir.1996) (upholding retrieval of information from

pager as search incident to arrest). The district court correctly denied Finley's motion to suppress the call records and text messages retrieved from his cell phone." *Id.* at 259-60.

{¶ 41} In a footnote, the court stated that the fact that the police transported Finley to Brown's residence did not alter its conclusion, citing *United States v. Edwards* (1974), 415 U.S. 800, 803, 94 S.Ct. 1234, 39 L.Ed.2d 771. *Id.* at 260, fn. 6. The court noted that searches and seizures that could be made on the spot at the time of arrest may legally be concluded later when the accused arrives at the place of detention as a search incident to arrest. Consequently, the court found the search of Finley was still substantially contemporaneous with his arrest. *Id.*

{¶ 42} At least one court has differed from the view expressed in *Finley*. In *United States v. Park* (N.D.Cal.2007), No. CR 05-375 SI, 2007 WL 1521573, the court held the warrantless searches of cellular phones lawfully seized from drug defendants at the time of their arrests, conducted an hour and one-half later, were not reasonable as incident to the defendants' arrests. There, the court found, unlike the *Finley* court, that for purposes of Fourth Amendment analysis, cellular phones should be considered "possessions within an arrestee's immediate control" and not part of "the person." *Id.* at *9. The court noted that this was so because modern cellular phones have the capacity to store immense amounts of private information. *Id.*

{¶ 43} In reaching this conclusion, the court relied on *United States v. Chadwick* (1977), 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538, abrogated on other

grounds by *California v. Acevedo* (1982), 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619. The Chadwick court suppressed the search of a locked footlocker seized by police officers from the trunk of the defendants' vehicle yet not searched until approximately one hour later at the Federal Building in Boston. Finding the search impermissible under the Fourth Amendment, the Court provided the following:

{¶ 44} "[Searches incident to custodial arrests] may be conducted without a warrant, and they may also be made whether or not there is probable cause to believe that the person arrested may have a weapon or is about to destroy evidence. The potential dangers lurking in all custodial arrests make warrantless searches of items within the 'immediate control' area reasonable without requiring the arresting officer to calculate the probability that weapons or destructible evidence may be involved. *United States v. Robinson,* 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973); *Terry v. Ohio,* [392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)]. However, warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the 'search is remote in time or place from the arrest,' *Preston v. United States,* [376 U.S. 364, 367, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964)], or no exigency exists. Once law enforcement officers have reduced luggage or other *personal property not immediately associated with the person of the arrestee* to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest." (Emphasis added.) *Id.* at 15.

{¶ 45} The *Park* court noted that the decision in *Chadwick* differed significantly from the Supreme Court's earlier decision in *Edwards*, where it initially recognized an exception to the requirement that a search incident to an arrest be conducted at approximately the same time as the arrest. In *Edwards*, the Court found that the delayed search of the defendant's clothing "was and is a normal incident of a custodial arrest, and reasonable delay in effectuating it does not change the fact that [the defendant] was no more imposed upon than he could have been at the time and place of the arrest or immediately upon arrival at the place of detention." *Edwards*, 415 U.S. at 805. At their core, *Edwards* and *Chadwick* created a distinction between "searches of the person" and "searches of possessions within an arrestee's control." The court in *Park* found "searches of the person" such as those in *Robinson and Edwards* distinguishable from the search of the defendant's cell phone in that case, providing that cell phones were more like warrantless searches of a purse, suitcase or briefcase under the exclusive control of the police where the arrestee can no longer gain access to the property to destroy evidence. *Park* at *7, citing *United States v. Monclavo Cruz* (C.A.9, 1981), 662 F.2d 1285, 1291 ("[P]ossessions within an arrestee's immediate control have fourth amendment protection at the station house unless the possession can be characterized as an element of the clothing, or another exception to the fourth amendment requirements applies.")

{¶ 46} Although we acknowledge the concern that the court in *Park* places on the enormous amount of private information subject to a search of cell phones, we are inclined to agree with the trial court and find

that *Finley* controls the instant matter. Here, the trial court denied Smith's suppression motion on the basis that police officers may search, without additional justification, "for evidence of the arrestee's crime on his person in order to preserve it for use at trial." (Judgment Entry at 6.) The record indicates that the police officers obtained Smith's cell phone immediately from his person. However, it is unclear whether they searched the phone's call records and numbers at the scene of the arrest or later at the station when they were securing the evidence. The trial court's decision, to which we agree, implies that both times are substantially contemporaneous to the arrest. This reasoning encompasses the holdings in both *Finley* and *Edwards* regarding a search incident to arrest of items found on one's person. See *Finley*, 477 F.3d at 260 ("In general, as long as the administrative process incident to the arrest and custody have not been completed, a search of effects seized from the defendant's person is still incident to the defendant's arrest."). See, also, *Edwards*, 415 U.S. at 803 ("[S]earches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention.").

{¶ 47} Moreover, we note that the trial court permitted only evidence pertaining to the cell phone's call record and numbers matching those supplied by the informant, Ms. Northern. It granted, however, Smith's motion to suppress incriminating photos also retrieved by the officers from the phone. In doing so, the court appropriately admitted only that evidence which the officers had a reasonable suspicion was on Smith's person at the time of his arrest. Thus, the broader privacy concerns addressed in *Park* were not

implicated here. See *United States v. Valdez* (E.D.Wis Feb.8, 2008), No. 06-CR336, 2008 WL 360548.

{¶ 48} Accordingly, we find that the court did not err in refusing to suppress evidence taken from Smith's cell phone that was seized from his person incident to his arrest. Appellant's fifth assignment of error is Overruled.

{¶ 49} The Judgment of the trial court is Affirmed.

FAIN, J., concurring.

{¶ 50} Although I concur in the opinion written by Judge Brogan for the court, I write separately to explain my reason for overruling Smith's Fifth Assignment of Error. I rest my concurrence in the overruling of this assignment of error on the narrowness of the trial court's suppression ruling.

{¶ 51} The trial court suppressed all evidence from the seized cell phone, except for the call record and numbers matching those supplied by the informant. I am impressed by the State's argument that, from the standpoint of the searching officers, there was some urgency in obtaining this information. A reasonable police officer could conclude that there might be a limit to the number of previous phone numbers contacted on the cell phone, and that the failure to obtain those phone numbers promptly might result in their becoming purged from the cell phone's memory as new calls came in. Thus, a reasonable police officer could conclude that there were exigent circumstances justifying obtaining the phone numbers stored in the memory of the cell phone without waiting for a warrant.

{¶ 52} The touchstone of any Fourth Amendment search and seizure is reasonableness. This is incorporated in the text of the amendment, itself: "The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (Emphasis added.)

{¶ 53} I conclude that it was reasonable for the officers taking Smith into custody to search the cell phone on his person for its record of phone numbers contacted, without first obtaining a warrant. On that narrow ground, I join in overruling Smith's Fifth Assignment of Error.

DONOVAN, J., dissenting.

{¶ 54} I disagree with the majority's resolution of the fifth assignment of error. Criminal procedure is a constant tug-of-war between the efforts of law enforcement to prosecute lawbreakers and the safeguarding of the constitutional rights of the citizenry. The requirement of a search warrant helps address this delicate balance by ensuring that police establish probable cause in order to invade a citizen's privacy. Given the practical aspects of police work, narrowly defined exceptions to the requitement of a search warrant have been created to assist police in their efforts against crime. The State, however, has a perpetual obligation to demonstrate that a warrantless search was valid. That burden was not overcome in the instant case.

{¶ 55} In somewhat broad dicta, upon which the majority partially relies, the U.S. Supreme Court stated that "[i]t is also plain that searches and seizures that could be made on the spot at the time of arrest may be legally conducted later when the accused arrives at the place of detention." *U.S. v. Edwards* (1974), 415 U.S. 800, 94 S.Ct. 4. In *Edwards*, the Court upheld the validity of a police search of the accused's clothes at the station house approximately ten hours after the arrest.

{¶ 56} Few courts, however, have addressed the legitimacy of allowing police to search a cellular phone for evidence incident to an arrest. In *United States v. Finley (C.A.5, 2007)*, 477 F.3d 250, certiorari denied (2007), ---U.S. ----, 127 S.Ct. 2065, 167 L.Ed.2d 790, as noted by the majority, the court held that the search of the defendant's cell phone was lawful as incident to an arrest. The court concluded that the cellular phone was analogous to a container that could lawfully be searched as part of a search incident to an arrest, pursuant to *New York v. Belton* (1981), 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768. Because the search took place only after a short time had elapsed between the accused's arrest and transport to the new location, the court found that the search was substantially contemporaneous. 477 F.3d at 260, n. 7. Additionally, because the cellular phone was found on the accused's person, the court citing *Edwards*, above, placed the cellular phone into the category of a search of the accused's person or clothing rather than a search of a possession within the immediate control of the accused. *Id.*

{¶ 57} In *United States v. Park (N.D. Cal.2007)*, No. CR 05-375 SI, 2007 WL 1521573, a federal district

court reasoned otherwise when addressing the warrantless search of a cellular phone. In *Park*, the accused's cellular phone was removed from him not at the time of the arrest but rather when he was entering into the police station as part of the booking process. *Park* at *2. The phone was subsequently searched by police detectives for call records and other evidence of the accused's drug crime. *Id.* The court noted the decision in *Finley*, but disagreed that a cellular phone should be characterized as part of the accused's person but rather, as a "possession within an arrestee's immediate control." *Id.* At *8. In essence, the *Park* court limited the broad dicta of *Edwards* to possessions that could "be characterized as an element of the clothing." *Id.* at 7. The court further distinguished *Finley* because the search there was more contemporaneous with the arrest. *Id.*

{¶ 58} In holding that the cellular phone should be categorized as the more protected category of possessions within an arrestee's immediate control, the *Park* court cited the privacy concerns inherent in modern cellular phones. The court noted that modern cellular phones "have the capacity for storing immense amounts of private information. Unlike pagers or address books, modern cellular phones record incoming and outgoing calls, and can also contain address books, calendars, voice and text messages, email, video and pictures." *Id.* at *8.

{¶ 59} The majority holds that the warrantless search of Smith's cell phone was a search of his person incident to a lawful arrest. Explicitly mentioned in their holding is that the search of the cell phone was substantially contemporaneous with Smith's arrest so as to fall under an exception to the warrant

requirement. The justification for such a search is for the protection of police (to secure items which might be used to injure the officer or effectuate an escape). *Preston v. United States* (1964), 376 U.S. 364, 367, 84 S.Ct. 881, 11 L.Ed.2d 777. A second basis upon which to conduct a search incident to an arrest is to prevent the destruction of evidence of crimes where said evidence is on the accused's person or within his immediate control. *Id.* Normally, a search incident to an arrest must be made contemporaneously with the arrest of the accused. "Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." *Id.*, citing *Agnello v. United States* (1925), 269 U.S. 20, 31, 46 S.Ct. 4, 70 L.Ed. 145.

{¶ 60} For a valid search incident to an arrest, there are two justifications-1) to protect the police from weapons or prevent the escape of the defendant, and 2) to preserve evidence of criminal activity. Here, the second justification is relevant to the search of Smith's cellular phone.

{¶ 61} The search of Smith's phone could not be regarded as contemporaneous. Smith's cellular phone was removed from him at the time of his arrest, but it is not apparent from the record that it was searched at or near that time. Smith was removed from the scene and booked into the jail. The police were on the scene of the arrest for as much as two hours after his arrest. No one testified with certainty as to whether the cellular phone was searched at the scene of the arrest. The detectives were certain at trial, however, that they searched the cellular phone several hours later at the station house. Several hours is not substantially contemporaneous. Additionally, the search was

conducted after the accused was booked in jail and after the police had exercised complete custody over the cellular phone. Because the search was not contemporaneous, an exception to the warrant requirement must be affirmatively established.

{¶ 62} The modern cellular phone is unlike most other things that the average citizen normally transports with him or her. It has the capacity to store and display great amounts of information: names, phone numbers, addresses, text messages, e-mails, photographs, videos. Those are some of the more basic features. Modern "smart phones" or "PDAs" can connect to a business server and access corporate data. An internet capable phone might record web browsing history. Music mp3s can be purchased, stored, and played. The divide between the personal computer and the cellular phone appears to be diminishing by the day.

{¶ 63} The fact that the modern cellular phone is increasingly akin to a modern personal computer shows that unless directed otherwise, the cellular phone should be placed in the more protected category of possessions within the immediate control of the accused. As the court in *Park* commented, "[a]ny contrary holding could have far ranging consequences." *Park*, 2007 WL 1521573 at *8. Strong privacy interests in the contents of a cell phone should not lay dormant until the police get around to searching it. Once contemporaneity is lost, the justifications for a valid search incident to arrest have little meaning. The police should obtain a search warrant, just as they would when they seize a personal computer from an accused.

{¶ 64} Additionally, the State of Ohio has not established any facts that would justify a non-contemporaneous warrantless search of the phone. No one testified at the motion to suppress regarding any concerns that evidence or data from the cellular phone may have been lost or deleted if the police were required to postpone their search of the cell phone and obtain a warrant. Furthermore, the search was conducted after the accused was booked into the jail, and the police had exclusive control and custody of the cell phone.

{¶ 65} I conclude that the data retrieved from the cellular phone should have been suppressed as the result of a warrantless search. The State did not affirmatively establish that the search of the cell phone was contemporaneous with Smith's arrest as is necessary for a valid search incident to an arrest, nor did it establish that the search was justified by any other exceptions to the warrant requirement. Thus, I would reverse the trial court's decision which overruled Smith's motion to suppress in part.

{¶ 66} Further, in a circumstantial case of this nature, the introduction of this evidence, obtained in contravention of the Fourth Amendment, was highly prejudicial, thus warranting a new trial. I would reverse and remand.

APPENDIX C

IN THE COMMON PLEAS COURT OF GREENE COUNTY, OHIO

CASE NO. 2007-CR-073

[Filed April 26, 2007]

STATE OF OHIO, Plaintiff	)
-vs-	)
ANTWAUN L. SMITH, Defendant	)

JUDGMENT ENTRY
(Sentencing)

On the 26th day of April 2007, the Defendant, Antwaun Smith was present in open Court with his counsel John Meehling, with David Hayes representing the State of Ohio, for sentencing pursuant to O.R.C. §2929.19.

The Court finds the Defendant has been convicted accordingly:

Count I: a violation of O.R.C. §2925.03(A), Trafficking in Cocaine, a felony of the first degree, with mandatory imprisonment;

Count II: a violation of O.R.C. §2923.24(A), Possession of Criminal Tools, a felony of the fifth degree;

Count III: a violation of O.R.C. §2923.24(A), Possession of Criminal Tools, a felony of the fifth degree;

Count IV: a violation of O.R.C. §2925.11(A), Possession of Cocaine, a felony of the first degree, (merges with Count I);

Count V: a violation of O.R.C. §2921.12(A)(1), Tampering with Evidence, a felony of the third degree;

subject to a presumption in favor of prison under division (D) of §2929.13 of the Ohio Revised Code, having been found guilty by jury verdict on the 28th day of March 2007.

The Court addressed the defendant and asked him if he wished to make a statement in his own behalf or present any information in mitigation of punishment. The Court afforded counsel an opportunity to speak on behalf of the Defendant, as required by Criminal Rule 32(A)(1).

The Court has considered the record, oral statements, any victim impact statement, as well as the principles and purposes of sentencing under O.R.C. §2929.11, and has balanced the seriousness and recidivism factors pursuant to O.R.C. §2929.12.

The Court finds pursuant to O.R.C. §2929.13(8) (find one of the following):

___ physical harm to person;
___ attempt or threat with a weapon;
___ attempt or threat of harm and previous conviction for physical harm;
___ public trust, office or position;
___ for hire, or organized crime;
___ sex offense;
X previous prison term served,
___ offender already under a community control (non-prison) sanction or on bond
___ offense committed while in possession of firearm;

and the Court further finds the defendant is not amenable to community control and prison is consistent with the purposes of O.R.C. §2929.11.

Therefore, IT IS THE ORDER OF THE COURT the defendant be sentenced to the Ohio Department of Rehabilitation and Correction (CORRECTIONAL RECEPTION CENTER) accordingly:

Count I: for a definite period of 8 years for the violation of O.R.C. §2925.03(A), Trafficking in Cocaine, a felony of the first degree, with mandatory imprisonment;

Count II: for a definite period of 11 months for the violation of O.R.C. §2923.24(A), Possession of Criminal Tools, a felony of the fifth degree;

Count III: for a definite period of 11 months for the violation of O.R.C. §2923.24(A),

Possession of Criminal Tools, a felony of the fifth degree;

Count IV: for a definite period of no sentence (merges with Count I) for the violation of O.R.C. §2923.24(A), Possession of Cocaine, a felony of the first degree,

Count V: for a definite period of 4 years for the violation of O.R.C. §2921.12(A)(1), Tampering with Evidence, a felony of the third degree;

said sentences in Counts I and III are to be served consecutively to each other but concurrently to Counts II and III for a total sentence of 12 years of which 8 years is a mandatory term pursuant to O.R.C. §2929.13(F), 2929.14(D), or Chapter 2925, and pay a mandatory fine in the sum of $10,000.00, after considering O.R.C. §2929.18. The defendant is entitled to jail time credit of 96 days as of this date along with future custody days while Defendant awaits transportation to the state institution.

The Court has further notified the defendant post release control is mandatory in this case up to a maximum of 5 years, as well as the consequences for violating conditions of post release control imposed by the Parole Board under O.R.C. §2967.28. The defendant is ordered to serve as part of this sentence any term of post release control imposed by the Parole Board, and any prison term for violation of post release control.

Pursuant to Criminal Rule 32 the Defendant is hereby notified of his right to appeal. If the Defendant

is unable to pay the cost of an appeal, the Defendant has the right to appeal without payment. If the Defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost. If the Defendant is unable to pay the costs of documents necessary to an appeal, the documents will be provided without cost. The defendant has a right to have a notice of appeal timely filed on his behalf.

The Court has considered the defendant's present and future ability to pay financial sanctions. Pursuant to O.R.C. §2929.18(D) the Court imposes a financial sanction of restitution as an Order in favor of the victim(s) of the offender's criminal act in the amount of $ 0 that can be collected through execution as described in division (D)(1) of O.R.C. §2929.18. The offender shall be considered for purposes of the collection as a Judgment Debtor. The Defendant is ordered to pay restitution of $ 0 , all costs of prosecution (Court costs etc.), and any fees permitted pursuant to O.R.C. §2929.18(A)(4). Pursuant to O.R.C. 2929.18(A)(1), the Defendant is ordered to pay a 5% surcharge on the amount of restitution, payable to the Clerk of Courts for the collecting and processing of restitution payments. Costs of proceedings are assessed against the Defendant for which execution is hereby awarded. All bonds posted in this matter are Ordered released, in accordance with O.R.C. §2947.23 and O.R.C. §2937.40.

Pursuant to O.R.C. §2925.03, the defendant's operator's license is ORDERED suspended for a period of 5 years.

Pursuant to HB 163, the defendant is ORDERED to pay $125.00 to the Beavercreek Police Department

for reimbursement costs for the laboratory analysis of evidence in this case.

Pursuant to O.R.C. §2901.07, the Defendant is ordered to submit to the collection of a DNA specimen.

According to §2925.1906(2)(f) of the O.R.C. the defendant is required not to ingest nor be injected with a drug of abuse. You are on notice that you are subject to random drug testing; and the results of said testing shall be made a part of your record.

The Defendant is REMANDED to the custody of the Sheriff of Greene County Ohio, for transportation to the Institution, according to law.

If I/ not approved, sentence given is appropriate.
[SAW]

APPROVED:

/s/ Stephen A. Wolaver
Common Pleas Judge

APPENDIX D

IN THE COMMON PLEAS COURT OF GREENE COUNTY, OHIO

Case No. 2007 CR 073

[Filed April 11, 2007]

STATE OF OHIO	)
	)
Plaintiff	)
	)
vs.	)
	)
ANTWAUN L. SMITH	)
	)
Defendant	)
	)

JUDGMENT ENTRY

This matter came for hearing before the Court on March 22, 2007, upon the Defendant's Motion to Suppress filed on February 23, 2007. Present in Court were the Defendant, represented by Attorney Kevin Lennen, and Assistant Prosecuting Attorney David Hayes. The Defendant's Motion to Suppress included three branches. First, the Defendant alleged that officers did not have reasonable suspicion upon which to stop, detain, and arrest the Defendant, and overall lacked probable cause to arrest the Defendant. Secondly, the Defendant alleged that any items seized

from the Defendant's person and property should be excluded as evidence due to the illegal arrest. Finally, the Defendant asked this Court to exclude as evidence any statements made by the Defendant to law enforcement officers as they were obtained as a result of the Defendant's illegal arrest.

The State of Ohio called four witnesses: Detective Craig Polston, Detective Scott Molnar, Officer Snyder, and Officer Kemph, all of the Beavercreek Police Department. The Defendant had the opportunity to cross-examine each witness, and the Defendant did not call any witnesses. After considering the testimony of the witnesses and the arguments of counsel, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

On January 21, 2007 Detective Polston and Detective Molnar were notified by Sgt. McFaddin of the following events. Beavercreek officers had responded to a suspected drug overdose at the address of 3884 Timberline Drive. Once inside, the officers found the owner of the residence suffering from a suspected drug overdose and the owner was transported to Miami Valley Hospital. Inside the residence, officers discovered what they believed to be a large amount of crack cocaine. The detectives proceeded to Miami Valley Hospital to speak to the owner identified as Wendy Sue Northern (hereinafter "Wendy"). Upon arrival, the detectives confronted Wendy with the information provided to them and persuaded her to aid them in setting up a drug deal with her supplier.

To facilitate this, Wendy provided four separate phone numbers that she used to contact her supplier whom she called "Capo". The detectives instructed Wendy to ask Capo for an ounce of crack cocaine and to have it delivered to 3884 Timberline Drive. Several phone calls were placed and a deal was setup to have "Capo" deliver an ounce of crack cocaine to 3884 Timberline Dr. Officer's Snyder and Kemph were on patrol that day and were asked by Detective Molnar to provide support in arresting "Capo" when he arrived. Det. Molnar informed the officers that a drug deal had been set-up, he provided a description of the suspect vehicle (a GMC Yukon SUV, dark in color) based upon information received from Wendy. In addition to the vehicle description, the information provided from Wendy led the detectives to identify "Capo" as Antwaun Smith. Detective Molnar provided the officers a photograph of Antwaun Smith and identified him as the suspected drug supplier.

"Capo" failed to show at the scheduled time and the officers were relieved from their support roles and custody of Wendy was transferred to Officer Snyder. Officer Snyder was instructed to permit Wendy to keep her cell phone and answer it should "Capo" attempt to contact her. While Wendy was in Officer Snyder's cruiser, her cell phone rang and she answered it. She informed Officer Snyder that her drug supplier was at her residence on 3884 Timberline Drive. Officer Snyder immediately relayed this information to Officer Kemph who proceeded to that address.

Officer Kemph arrived at the address with Officer Williams of the Beavercreek Police Department. Once there, Officer Kemph observed a black GMC Yukon SUV type vehicle in the driveway with an individual in

the driver's seat who matched the description and photograph previously provided by Det. Molnar. In addition, there were two other individuals in the vehicle; a black female in the front passenger seat and a black male in the back passenger seat. The officer's exited their cruisers with weapons drawn and proceeded to arrest the occupants of the vehicle.

Detective Molnar arrived on the scene shortly thereafter and handcuffed and searched Antwaun Smith. On his person, the detective discovered a cell phone, 2,500 dollars in cash, and a small amount of marijuana. No cocaine was found on the Defendant's person, however. Immediately following his arrest, Detective Polston asked the Defendant about the location of the crack cocaine, to which the Defendant responded and made statements. The Defendant was never questioned following that exchange on the scene. The Defendant was not given his Miranda warnings until after that exchange occurred. The Defendant was arrested for trafficking in cocaine and placed in a cruiser. Approximately two hours later, Detective Molnar found two baggies of suspected crack cocaine approximately two to three feet outside the driver's side door of the vehicle.

Subsequently, the detectives searched the Defendant's cell phone prior to it being booked into evidence. In the phones call records they discovered that the number of that phone matched one of the numbers provided to them by Wendy. Further, the phone included Wendy's home and cell phone numbers. In addition, the phone contained several photographs of the Defendant posing with what appeared to be handguns and cocaine while wearing a bullet proof vest.

CONCLUSIONS OF LAW

With regard to branch one of the Defendant's Motion to Suppress, the Court finds that the defendant was arrested by Officer's Kemph and Williams when they exited their cruisers with weapons drawn. Thus, the officers must have had probable cause to place the Defendant under arrest. Probable cause exists when a reasonably prudent person would believe that the person to be arrested has committed a crime. Beck v. Ohio, 379 U.S. 89, 85. In the instant case, the officers had sufficient probable cause to place the defendant under arrest. Officer Kemph testified that he was informed of the drug deal and its location, he was provided with a description of the suspect and the suspect vehicle, and that upon arriving at 3884 Timberline Drive, the vehicle he observed matched the description as did the individual in the driver's seat. Further, Officer Snyder indicated that she relayed to Officer Kemph that Wendy informed her that the person they had been waiting for was in her driveway, and Officer Kemph reported to the residence immediately after receiving this information. Based upon the foregoing, probable cause existed to arrest the Defendant. Thus, the Court overrules branch one of the Defendant's Motion to Suppress.

With regard to branch two, the Defendant is seeking to suppress the cash and cell phone found on his person, in addition to the narcotics found on the scene outside the vehicle as fruits of the illegal arrest. Specifically, the Defendant seeks to suppress what the officers found while searching the cell phone - the phone numbers and the photographs.

With regard to the cash and the phone itself, the Court specifically finds that the Defendant was lawfully under arrest, and therefore, his person could be searched incident to arrest. Therefore, the cash and the cell phone will be admitted into evidence. With regard to the narcotics, the Court specifically finds that the drugs were found outside the presence of the Defendant on the ground. The Defendant has no privacy interest in narcotics laying on the ground and he has not asserted one here.

With regard to the items recovered from the cell phone. The Court notes that there is a dearth of Ohio case law regarding whether or not a warrant is required to search the contents of a cell phone that is seized pursuant to a lawful arrest. However, the Court has found one Federal case directly on point. In United States v. Finley, 477 f.3d 250, the Fifth Circuit Court of Appeals addressed the question of whether or not a warrantless search of the call records and text messages from a lawfully seized cell phone was itself unlawful. Accepting that the defendant had standing to contest the search, the Court concluded the following:

> Although Finley has standing to challenge the retrieval of the call records and text messages from his cell phone, we conclude that the search was lawful. It is well settled that "in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *United States v. Robinson*, 414 U.S. 218, 235, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). Police officers are not constrained to

search only for weapons or instruments of escape on the arrestee's person, they may also, without any additional justification, look for evidence of the arrestee's crime on his person in order to preserve it for use at trial. *See id.* at 233-34, 94 S.Ct. 467. The permissible scope of a search incident to a lawful arrest extends to containers found on the arrestee's person. *United States v. Johnson*, 846 F.2d 279, 282 (5th Cir.1988) (per curiam); *see also New York v. Belton*, 453 U.S. 454, 460-61, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981) (holding that police may search containers, whether open or closed, located within arrestee's reach); *Robinson*, 414 U.S. at 223-24, 94 S.Ct. 467 (upholding search of closed cigarette package on arrestee's person).

Finley concedes that the officers' post-arrest seizure of his cell phone from his pocket was lawful, but he argues that, since a cell phone is analogous to a closed container,;B0066;B0066 [FN6] the police had no authority to examine the phone's contents without a warrant. He relies on *Walter v. United States*, 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980), for this proposition. *Walter*, however, is inapposite because in that case no exception to the warrant requirement applied, *see id.* at 657, 100 S.Ct. 2395, whereas here no warrant was required since the search was conducted pursuant to a valid custodial arrest, *see Robinson*, 414 U.S. at 235, 94 S.Ct. 467. Special Agent Cook was therefore permitted to search Finley's cell phone pursuant to his arrest.; *B0077,B0077Cf. United States v. Ortiz*, 84 F.3d 977, 984 (7th Cir.1996) (upholding retrieval of information from pager

as search incident to arrest). The district court correctly denied Finley's motion to suppress,[B00888,B00888] the call records and text messages retrieved from his cell phone.

The Court finds the Fifth Circuits reasoning persuasive. The Defendant has a reasonable expectation of privacy in the contents of his cell phone. However, based upon the foregoing, the Court finds that in conducting a search incident to an arrest, police officers "...are not constrained to search only for weapons or instruments of escape on the arrestee's person; they may also, without any additional justification, look for evidence of the arrestee's crime on his person in order to preserve it for use at trial." U.S. v. Finley, supra.

Therefore, the Court will admit the call records and phone numbers retrieved from the Defendant's cell phone, however, because the photographs recovered from the cell phone had nothing to do with the present offense, the Court will exclude them.

With regard to Branch three, the Court finds, based upon the testimony of the officers, that the Defendant was under arrest and in custody when Detective Polston asked him the question regarding the location of the narcotics, therefore, any statements made in response to that questions and prior to the Defendant being read his Miranda rights are excluded from evidence at trial.

IT IS SO ORDERED

/s/
Judge Stephen A. Wolaver

Copies to: Greene County Prosecutor's Office, 61 Greene St., Xenia, OH
John Rion, 130 W. Second St., Suite 2150, P.O. Box 10126, Dayton, OH

APPENDIX E

THE SUPREME COURT OF OHIO

Case No. 2008-1781
Greene County

[Filed February 10, 2010]

State of Ohio,	)
	)
v.	)
	)
Antwuan Smith	)
	)

RECONSIDERATION ENTRY

It is ordered by the Court that the motion for reconsideration in this case is denied.

(Greene County Court of Appeals; No. 07CA47)

/s/
THOMAS J. MOYER
Chief Justice

No. 09-1377

IN THE
Supreme Court of the United States

OHIO,
Petitioner,
v.
ANTWAUN SMITH,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

STEPHANOS BIBAS
Counsel of Record
NANCY BREGSTEIN GORDON
University of Pennsylvania Law School Supreme Court Clinic
3400 Chestnut Street
Philadelphia, PA 19104
(215) 746-2297
sbibas@law.upenn.edu

CRAIG M. JAQUITH
Office of the Ohio Public Defender
250 East Broad Street
Suite 1400
Columbus, OH 43215
(614) 466-5394

QUESTION PRESENTED

Does the Fourth Amendment allow warrantless searches incident to arrest of a second-generation cell phone, where the record is unclear about how many hours later the search occurred, where it occurred, and the limitations and capabilities of the phone?

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REASONS FOR DENYING THE PETITION 1

STATEMENT OF THE CASE 2

I. FACTUAL BACKGROUND 2

II. PROCEDURAL HISTORY 4

SUMMARY OF ARGUMENT 8

ARGUMENT 9

I. THERE IS NO CLEAR, MATURE DIVISION OF AUTHORITY ON WHETHER POLICE MAY SEARCH A CELL PHONE LIKE MR. SMITH'S INCIDENT TO ARREST WITHOUT A WARRANT 9

A. The Few Appellate Decisions Cited in the Petition Are Inapposite, Unclear, or Lacking in Analysis 9

B. The Asserted Division is New and Immature 14

II. REVIEW IN THIS CASE RISKS NOT ONLY PASSING UPON A DYING TECHNOLOGY OF LIMITED FUTURE IMPORTANCE, BUT ALSO FREEZING IN PLACE RULES THAT MAY POORLY SUIT THE SMART PHONES AND PRIVACY EXPECTATIONS OF THE FUTURE 15

III. THE RECORD IN THIS CASE IS TOO INCOMPLETE AND MURKY FOR THIS COURT TO ADDRESS THE QUESTION PRESENTED 18

A. The Search-Incident-to-Arrest Exception Is Inapplicable Because the Record Is Unclear About the Time and Place of the Search and Who Conducted It 18

B. Any Ruling by This Court May Not Affect the Ultimate Outcome of This Case 20

IV. THE DECISION BELOW IS CORRECT 21

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases

California v. *Acevedo*, 500 U.S. 565 (1991) 19

Chambers v. *Maroney*, 399 U.S. 42 (1970) 11

Chimel v. *California*, 395 U.S. 752 (1969) 11, 23

City of East Liverpool v. *Columbiana Cty. Budget Comm'n*, 876 N.E.2d 575 (Ohio 2006) 8 n.3

City of Ontario v. *Quon*, 130 S. Ct. 2619 (2010) 8, 17, 18

Katz v. *United States*, 389 U.S. 347 (1967) 22

Langnes v. *Green*, 282 U.S. 531 (1931) 22 n.9

New York v. *Belton*, 453 U.S. 454 (1981) 5, 6, 23

Ohio v. *Robinette*, 519 U.S. 33 (1996) 13, 19

State v. *Boyd*, 992 A.2d 1071 (Conn. 2010) 10, 11

State v. *Nix*, No. 07122775, A138483, 2010 WL 2508919 (Or. App. June 23, 2010) 19 n.8

State v. *Smith*, 920 N.E.2d 949 (Ohio 2009) 5, 6, 6 n.2, 7, 23

State v. *Smith*, No. 07-CA47, 2008 WL 2861693 (Ohio Ct. App. July 25, 2008) 5, 22

Stoner v. *California*, 376 U.S. 483 (1964) 19, 22

Terry v. *Ohio*, 392 U.S. 1 (1968) 23

United States v. *$639,558*, 955 F.2d 712 (D.C. Cir. 1992) 20

United States v. *Chadwick*, 433 U.S. 1 (1977) 19, 20, 22

United States v. *Finley*, 477 F.3d 250 (5th Cir.), *cert. denied*, 549 U.S. 1353 (2007) ..... *passim*

United States v. *Murphy*, 552 F.3d 405 (4th Cir.), *cert. denied*, 129 S. Ct. 2016 (2009) 12, 13, 14, 15

United States v. *Ortiz*, 84 F.3d 977 (7th Cir. 1996) 11

United States v. *Vasey*, 834 F.2d 782 (9th Cir. 1987) 20

Other Authorities

U.S. Const. amend. IV ..... *passim*

Brief of Appellee, *United States* v. *Murphy*, 552 F.3d 405 (4th Cir.), *cert. denied*, 129 S. Ct. 2016 (2009) 12 n.4

GSM Arena, *Compare Motorola V3X Motorola Razr V3XX*, http://www.gsmarena.com/compare.php3?idPhone1=1120 &idPhone2=1648 13

REASONS FOR DENYING THE PETITION

This Court need not wade into the murky record here to resolve whether police may search cell phones incident to arrest, an issue on which there is no clear division of authority. Any tension involving at most one or two terse appellate precedents is new and immature. This Court should await further percolation and technological developments in smart phones instead of prematurely creating new rules.

Furthermore, this case is a poor vehicle. The record is unclear about key facts on which the search-incident-to-arrest doctrine turns, such as who searched the cell phone where and when, as well as the phone's capabilities and limitations. Because the state failed to prove that the search was contemporaneous with the arrest, the search-incident-to-arrest doctrine is not squarely implicated here. And Ohio seeks review of this Fourth Amendment issue while maintaining that this Court's ruling either way will not change the outcome of this case.

In any event, the decision below is correct. As noted above, Ohio has not satisfied its burden of proving that the search-incident-to-arrest exception even applies. In addition, cell phones are not analogous to closed containers. They pose neither a danger to officers nor a significant risk of destruction of evidence once police have seized them, yet owners have much greater privacy interests in them than in cigarette packs, pill bottles, and the like. Further review is unwarranted.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

On January 21, 2007, police officers in Beavercreek, Ohio found Wendy Northern passed out in a bathroom in her home, apparently from a drug overdose. They had paramedics rush her to the hospital. Trial Tr. 37. After officers found crack cocaine in Ms. Northern's purse, *Id.* at 38, two detectives -- Molnar and Polston -- went to the hospital, arrested her, and brought her to the police department. Ms. Northern identified the respondent, Antwaun Smith, as her supplier. Trial Tr. 101; Supp. Hr'g Tr. 10.

Hoping for leniency, Ms. Northern agreed to set up a drug deal with Mr. Smith. *See* Trial Tr. 75-76. In recorded telephone calls to Mr. Smith, she arranged for him to deliver an ounce of crack cocaine to her at her home. Trial Tr. 107, 109. The detectives were not sure Mr. Smith would show up (because he repeatedly postponed his arrival), so officers drove Ms. Northern to the county jail. *Id.* at 114-15; Supp. Hr'g Tr. 15-16.

En route, she received a call from Mr. Smith, saying that he had arrived at her house. Trial Tr. 116. When the police arrived, they saw Mr. Smith and two passengers in an SUV in the driveway. *Id.* at 179. The officers ordered all three to get out of the SUV, and they arrested Mr. Smith at about 6:30 p.m. *Id.* at 124, 229-30. A pat-down

of Mr. Smith's outer garments found $2500 in cash, a small baggie of marijuana, and a Motorola Razr cell phone, but no cocaine. *See id.* at 305. Officers then took Mr. Smith to the police station.

Sometime between about 7:30 and 8:00 p.m., Detective Molnar found two baggies of crack cocaine in the snow near the driver's-side door of the SUV. *Id.* at 310, 330-31. *But cf. id.* at 228, 232 (indicating that the baggies had not been found until at least 7:56 p.m.). After that, Detectives Molnar and Polston remained on the scene until about 8:30 or 9:00 p.m. *Id.* at 330-31. Neither detective could state with certainty whether either of them searched Mr. Smith's cell phone during this time. Supp. Hr'g Tr. 33, 63-64.

Ohio acknowledges that the record is unclear as to who eventually searched Mr. Smith's cell phone, or when. Pet. 15. The murky record merely indicates that one of those two detectives searched it at some point before about 10:35 p.m., when it was booked into evidence. Ex. 15. Detective Polston testified that he recalled a search at some point at the police station, Supp. Hr'g Tr. 33, suggesting that it most likely occurred towards the tail end of the four-plus hours following the arrest.

At some point during this four-hour period, either Detective Molnar or Detective Polston rummaged through photographs stored in Mr. Smith's cell phone, as well as its call log. Supp. Hr'g Tr. 33, 64.

The log showed a call to Ms. Northern's phone and a call from her phone to his. *Id*; Trial Tr. 130-32. The police took photographs of the call log. Trial Tr. 126.

Mr. Smith did not consent to the search, and the police neither sought nor obtained a warrant. At the suppression hearing, neither detective testified that he believed exigent circumstances were present, nor did either one offer any explanation for not seeking a warrant.

II. PROCEDURAL HISTORY

1. A Greene County grand jury indicted Mr. Smith, charging him with trafficking in and possession of cocaine, evidence tampering, and possessing criminal tools. He pleaded not guilty to all charges.

Before trial, Mr. Smith moved to suppress the fruits of the warrantless search conducted on the night of his arrest, including the contents of his cell phone. The trial court agreed that he had a reasonable expectation of privacy in his cell phone's contents. It nevertheless denied the motion, relying on *United States* v. *Finley*, 477 F.3d 250 (5th Cir. 2007), *cert. denied*, 549 U.S. 1353 (2007), the only case it found relevant. Pet. App. 50a, 55a-57a. The court excluded the photographs, however, as irrelevant to the crimes charged.

The jury convicted Mr. Smith on all counts, and the trial court sentenced him to twelve years' imprisonment and a $10,000 fine. *Id.*

at 44a, 46a-47a.

2. Mr. Smith timely appealed the trial court's denial of his suppression motion, arguing that there had been no exigent circumstances to justify the warrantless search. The Ohio Court of Appeals affirmed. *Id.* at 21a, No. 07-CA47, 2008 WL 2861693 (Ohio Ct. App. July 25, 2008). Though the majority agreed that a cell phone search incident to arrest implicates serious privacy concerns, it likewise relied on *Finley*. Pet. App. at 31-36a. The dissenting judge viewed the search as a violation of Mr. Smith's reasonable expectations of privacy. She also considered the search not contemporaneous with, and thus not incident to, the arrest, so that it should not have been allowed under that exception to the warrant requirement. *Id.* at 41a-42a.

3. Mr. Smith again timely appealed, arguing that the warrantless cell phone search violated the Fourth Amendment. The Supreme Court of Ohio agreed and reversed. *Id.* at 1a, 920 N.E.2d 949.[1]

a. First, the Ohio Supreme Court rejected the trial court's characterization of the cell phone as a closed container. It noted that under *New York* v. *Belton*, 453 U.S. 454 (1981), a searchable "container" is "'any object capable of holding another object,'" Pet. App. 10a, 920 N.E.2d at 954 (quoting 453 U.S. at 460). Items traditionally

[1] Ohio argued in the alternative that the admission of the evidence did not prejudice Mr. Smith in light of the overwhelming evidence against him. Merit Br. of Appellee-State of Ohio 7-8. The Ohio Supreme Court did not discuss or rule upon this contention.

falling under *Belton* thus have been "physical objects capable of holding other physical objects." *Id.* The court also observed that cell phones like Mr. Smith's do not even resemble the pagers and computer memo books that some federal courts have likened to closed containers. *Id.* at 10a, 920 N.E.2d at 954. Rather, such "modern cell phones are capable of storing a wealth of digitized information wholly unlike any physical object found within a closed container." Pet. App. 10a-11a, 920 N.E.2d at 954.

b. The Ohio Supreme Court held that these phones' capacity to store "large amounts of private data gives their users a reasonable and justifiable expectation of a higher level of privacy in the information they contain." Pet. App. 12a, 920 N.E.2d at 955.[2] The traditional justifications for warrantless searches incident to arrest, "officer safety and the preservation of evidence," are not present in a cell phone search such as the one at issue here. *Id.* at 13a, 920 N.E.2d at 95. Police satisfy their interest in preserving evidence simply by taking custody of the phone. Once they do so, "police must then obtain a warrant before intruding into the phone's contents." *Id.* at 12a-13a, 920 N.E.2d at 954. The court also rejected Ohio's argument that exigent circumstances justified this warrantless search, because Ohio

[2] The court noted some of the functions Mr. Smith's phone could perform, such as sending text messages and taking and storing photographs. *See* Pet. App. 11a, 920 N.E.2d at 954.

had neither raised the argument below nor introduced any evidence to support it. *Id.* at 13a-14a, 920 N.E.2d at 955.

In sum, the court held that "because a cell phone is not a closed container, and because an individual has a privacy interest in the contents of a cell phone that goes beyond the privacy interest in an address book or pager, an officer may not conduct a search of a cell phone's contents incident to a lawful arrest without first obtaining a warrant." *Id.* at 13a, 920 N.E.2d at 955. Accordingly, the cell phone evidence admitted by the trial court should have been excluded. The court reversed and remanded the case to the trial court for further proceedings consistent with its opinion. *Id.* at 15a, 920 N.E.2d at 956.

c. The dissenting justices would have upheld the search, by analogy to searches of address books, because the evidence introduced at trial came from the phone's address book and call log. *Id.* at 18a, 920 N.E.2d at 957. The dissent did not mention the intrusion that occurred when the officers rummaged through Mr. Smith's photographs, or that Ohio sought to introduce them into evidence.

d. The Supreme Court of Ohio denied Ohio's motion for reconsideration, without opinion. Pet. App. 59a.[3] Ohio's petition for certiorari followed.

---

[3] In seeking reconsideration, Ohio argued for the first time, in the alternative, that the good-faith exception to the exclusionary rule should save the fruits of the search even if the search was unconstitutional. *Cf.* Pet. 22-24 (renewing

SUMMARY OF ARGUMENT

There is no clear, mature division of authority calling for this Court's review. Most of the decisions cited by Ohio are trial-court decisions, involved a pager rather than a cell phone, or involved the automobile-search doctrine rather than a search incident to arrest. One or two appellate precedents are terse and factually unclear; at most they create a new, immature tension that may resolve itself. This Court should hesitate to rule on the evanescent technology of conventional cell phones, and instead await smart phone case law. As this Court recognized just a few months ago in *City of Ontario* v. *Quon*, 130 S. Ct. 2619 (2010), courts should be slow to intervene in applying the Fourth Amendment to new communication technologies. More percolation is needed, to allow more time for technologies and expectations of privacy to evolve. It would be premature for the Court to wade into the merits until lower courts have considered all aspects of the issues and furnished appropriate guidance.

Moreover, this case suffers from grave vehicle problems. The record is foggy about how close in time and place the search was to the arrest, key facts in analyzing searches incident to arrest. Thus, Ohio

---

this argument). The Ohio Supreme Court did not rule on this argument, presumably because Ohio had not raised or briefed the issue in a timely manner. *See City of East Liverpool* v. *Columbiana Cty. Budget Comm'n*, 876 N.E.2d 575, 575 (Ohio 2006) (argument not made in a party's briefs until a motion for reconsideration in the Supreme Court is "deemed to be abandoned" (internal quotation marks omitted)).

has failed to carry its burden of proving that the search was contemporaneous with the arrest, so the question presented is not squarely implicated. The record does not even reflect the model and capabilities of the cell phone at issue. Ohio also claims that admitting the fruits of the search made no difference, so it contends that any ruling would not influence the ultimate outcome.

Finally, the decision below is correct. Warrants are presumptively required for searches. The justifications for searches incident to arrest, to protect officer safety and prevent destruction of evidence, do not apply to cell phones. Cell phones are not analogous to closed containers and involve much stronger reasonable expectations of privacy. There is no need for this Court to intervene.

ARGUMENT

I. THERE IS NO CLEAR, MATURE DIVISION OF AUTHORITY ON WHETHER POLICE MAY SEARCH A CELL PHONE LIKE MR. SMITH'S INCIDENT TO ARREST WITHOUT A WARRANT

A. The Few Appellate Decisions Cited in the Petition Are Inapposite, Unclear, or Lacking in Analysis

Whether police may search a cell phone without a warrant, incident to a lawful arrest, is a novel issue. Few appellate courts, federal or state, have even addressed the question. Most of the cases cited by Ohio are federal district court decisions that have not yet reached the courts of appeals (Pet. 9-11, 16-18), but presumably soon

will. The few appellate precedents are either factually distinguishable or lack factual detail and legal analysis. Once considerably more cases reach the appellate courts, those courts may reach consistent conclusions on their own, without the need for this Court's intervention.

1. Two of the four appellate decisions cited by Ohio are completely inapposite. One did not involve the search-incident-to-arrest doctrine; the other did not concern a cell phone.

State v. *Boyd*, 992 A.2d 1071 (Conn. 2010) (cited at Pet. 9, 11), did not involve the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement. That exception is based on the need to protect officers from dangerous weapons and to prevent arrestees from concealing or destroying evidence. *Chimel* v. *California*, 395 U.S. 752, 763 (1969). In *Boyd*, the Connecticut Supreme Court based its approval of a cell phone search on the entirely distinct *automobile* exception to the warrant requirement. 992 A.2d at 1088-90. That exception is based on an automobile's mobility and other factors unique to automobiles, and it does not require that searches be conducted contemporaneously with arrests. *See, e.g.*, *Chambers* v. *Maroney*, 399 U.S. 42, 47-52 (1970) (upholding automobile search even though it occurred too long after arrest to qualify as a search incident to arrest). *Boyd* is therefore inapposite.

The Seventh Circuit's decision in *United States* v. *Ortiz*, 84 F.3d 977 (7th Cir. 1996) (cited at Pet. 9, 11, 16, 20), upheld the warrantless search of a pager, not a cell phone. The court's reasoning depended on several peculiarities of 1990's-era pagers, including the likelihood that new pages would displace old ones because of limited storage capacity, and that turning off power or touching a button would wipe out a pager's memory. *Id.* at 984. Those concerns are far weaker for Mr. Smith's cell phone or for most cell phones, which have much more memory than pagers and retain information even when powered off. In addition, Mr. Smith's cell phone, like other newer cell phones and unlike pagers, stores more than just phone numbers. Stored data, such as text messages and photographs, implicate greater concerns about invasion of privacy. Thus, *Ortiz* is also inapposite.

2. Only two federal appellate precedents (and no decisions from other state supreme courts) have applied the search-incident-to-arrest exception to cell phone searches. It appears, however, that the phones at issue there were more primitive, earlier-generation phones than the one in this case.

In a short, two-paragraph discussion, the Fifth Circuit in *Finley* treated an unspecified type of cell phone as a closed "container" that the police could search to preserve evidence. 477 F.3d at 259-60; Pet. 15-16. Last year, the Fourth Circuit agreed with the Fifth, relying on

Finley without any independent analysis. *United States* v. *Murphy*, 552 F.3d 405, 411-12 (4th Cir.), *cert. denied*, 129 S. Ct. 2016 (2009); Pet. 16.

Neither *Finley* nor *Murphy* provides enough factual detail to indicate a clear conflict with the decision below. Neither decision described the type or model of cell phone involved, or its memory, battery life, or technological capabilities. Neither provided specifics of what functions the cell phones could perform, or details about the searches.[4] Since the facts of Fourth Amendment cases are so critical in determining the reasonableness of a search or seizure, *Ohio* v. *Robinette*, 519 U.S. 33, 39 (1996), the skeletal outlines of these cases' facts make it impossible to conclude that they are inconsistent with the decision below.

3. To the extent that one can ascertain the facts of *Finley* and *Murphy*, the cell phones and searches in those cases appear to have differed in critical respects from those in this case. The phones in *Finley* and *Murphy* appear to have been basic, first-generation phones that just made, received, and logged calls and text messages. The

[4] "Because [Murphy's] argument [that he enjoyed a heightened privacy interest in his cell phone] was not raised below in the Motion to Suppress, at the hearing, or in any objection to the Magistrate's Report and Recommendation, specific details concerning the type or nature of the phone are, as he points out, not included in the record." Br. of Appellee at 25 n.8, *Murphy*, 552 F.3d 405. The record in *Murphy* was also unclear about whether police had seized the phone from Murphy's person or from his car. *Id.* at 24-25.

opinions merely state that the agent in *Finley* "searched through the phone's call records and text messages," 477 F.3d at 254, and that in *Murphy* an agent "identified several text messages." 552 F.3d at 409.

Mr. Smith's phone, by contrast, has dozens of megabytes of memory and several hundred hours of standby battery life. It allows users not only to talk, text, and store phone numbers, but also to take and store photographs. GSM Arena, *Compare Motorola V3X Motorola Razr V3XX*, http://www.gsmarena.com/compare.php3? idPhone1=1120 &idPhone2=1648.[5] The police in this case in fact rummaged through the photographs.

The degree of privacy attached to the information on these different types of phones necessarily would differ. The privacy interests in *Finley* and *Murphy* most likely would be less than Mr. Smith's privacy interest in the more extensive data on his phone. Thus, the Ohio Supreme Court's differing conclusion, on the facts of this case and this particular phone, does not establish a conflict.

---

[5] While the model of Mr. Smith's phone and this technical information are not in the record, at oral argument before the Ohio Supreme Court the prosecutor represented that the cell phone was a Motorola Razr. Though we cannot know the exact version, the photograph of Exhibit 7 appears to match photographs of the Motorola Razr V3x or V3xx, which were the most recent versions of the Razr being sold in 2006. The technical aspects of a particular cell phone, such as what functions it can perform and what searching it might reveal, are highly relevant to its owner's privacy interests and the reasonableness of a search. Counsel is providing this extra-record information on these points because Ohio did not develop a record containing any of this information, making this case an especially poor vehicle for the Court's review.

4. Nor does either *Finley* or *Murphy* contain enough reasoned analysis to indicate a clear conflict with the decision below. Neither opinion grapples with the fundamental issues raised by warrantless searches of modern cell phones.

Although considered the leading case so far, *Finley* was not decided on a truly adversarial presentation of the issues. Mr. Finley did not dispute the characterization of his cell phone as a closed container. On the contrary, he argued that it should be treated as such. The Fifth Circuit therefore assumed that point; it did not need to analyze or decide it. 477 F.3d at 260.

For his part, Mr. Murphy argued that the police had to ascertain the storage capacity of each individual arrestee's cell phone to determine how private it was and whether they could search it without a warrant. The Fourth Circuit understandably rejected such a rule as impractical. *Murphy*, 552 F.3d at 411.

B. The Asserted Division is New and Immature

Even if there were any tension between the decision below and *Finley* and *Murphy*, it would be brand new and immature. The decision below was the first state high court decision to hold the search of a cell phone incident to arrest unconstitutional. It was also the first

appellate decision to reject the simplistic characterization of a cell phone as a closed container.

Other courts have not yet reacted to the Ohio Supreme Court's reasoning, either by following it or criticizing it. Neither the Fourth nor the Fifth Circuit reheard the issue *en banc* or was asked to do so. Panels of those courts or the entire court might reach different conclusions in future cases, based on different or better-developed facts, a more particularized understanding of the capabilities of current cell phones, or in light of the decision below.

Perhaps because of the issue's immaturity and the earlier cases' lack of factual detail or analytical depth, this Court denied certiorari in *Finley* and, less than a year ago, in *Murphy*. This Court should continue to await further percolation before considering this issue.

II. REVIEW IN THIS CASE RISKS NOT ONLY PASSING UPON A DYING TECHNOLOGY OF LIMITED FUTURE IMPORTANCE, BUT ALSO FREEZING IN PLACE RULES THAT MAY POORLY SUIT THE SMART PHONES AND PRIVACY EXPECTATIONS OF THE FUTURE

1. This Court should hesitate to rule on a constitutional question concerning an evanescent technology such as the cell phone here. The cell phone at issue in this case, a Motorola Razr, is a typical second-generation cell phone. Introduced in 2004, it performs more advanced functions and has a larger storage capacity than typical first-generation cell phones.

While it was cutting edge when introduced in 2004, the Razr has since been discontinued. Like other phones of its vintage, it is now a dinosaur compared to the latest generation of cell phones currently in use and on the market. Ohio acknowledges that the current generation of phones, so-called smart phones, are the wave of the future. *See* Pet. 3. As a practical matter, therefore, any ruling in the instant case may not be important far beyond the present case.

Today's smart phones, such as the Blackberry, iPhone, Droid, and many other models, are really hand-held wireless computers that also happen to be phones. Many of the newer cell phones have as much memory as desktop computers had a few years ago, and more than 500 times that of a Razr. They can perform thousands of functions ("applications", or "apps") that could hardly have been imagined just a few years ago.[6]

Many smart phone owners, especially those under 30, use the plethora of applications more than the phone-calling function. Many cell phone users keep most of their personal data on their cell phones,

---

[6] Users can not only make and receive calls, send and receive text messages, take pictures, and store phone numbers, but also can hold conference calls; play, identify, and transmit music; take and store thousands of high-quality pictures and full-length videos; access the internet (both e-mail and web sites); download lengthy document attachments; access GPS (global positioning systems); make credit-card purchases and charitable and political contributions; pay parking meter fees; and retrieve, store, and transmit banking information.

thus carrying all of their "papers and effects" with them in a way that they could not carry tangible documents.

While the privacy interests implicated in this case are greater than in cases involving first-generation phones, those implicated in future smart phone cases may be even greater, and the issues more complex.[7] These substantial differences could shape how courts apply Fourth Amendment precedents to searches of smart phones. As cell phones grow to hold more and more private types of searchable data, the analogy to wallet and address-book searches grows far weaker.

No appellate court has yet ruled on admitting evidence from a smart phone searched incident to arrest. Until courts articulate their reasoning and the relevant considerations for conventional phones as well as smart phones, this Court's review would be premature.

2. Review in this case risks not only passing upon a dying technology of limited future importance, but freezing in place rules that may poorly suit the smart phones and privacy expectations of the future. This Court recognized as much just last Term, in *Quon*. "The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." 130 S. Ct. at 2629. The Court specifically mentioned

[7] There may also be differences based on the respective phones' ability to preserve or destroy stored data. *Compare* Pet. 3 (expressing concerns that smart phones might self-destroy or allow for remote destruction of evidence) *with id.* at 13-14 (noting that Mr. Smith's phone is not a smart phone).

individuals' privacy interests in "[c]ell phone and text message communications," *id.* at 2630, and, of course, people also enjoy privacy interests in the myriad other forms of data stored on cell phones. "Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations . . . [in electronic] communication devices." *Id.* at 2629.

III. The Record In This Case Is Too Incomplete and Murky for This Court to Address the Question Presented

A. The Search-Incident-to-Arrest Exception Is Inapplicable Because the Record Is Unclear About the Time and Place of the Search and Who Conducted It

The critical questions in Fourth Amendment cases are who searched what, when, why, how, and how extensively. Fourth Amendment decisions are intensely fact-specific and turn on these details. *See Robinette*, 519 U.S. at 39. Yet here, highly relevant facts are missing or unclear about when and where the phone was searched, precisely how, and even by whom. Nor is there evidence in the record about the memory, battery life, or technological capabilities of the phone at issue or the kinds of data stored on it. *See supra* p.13 n.5. If certiorari is granted, these deficiencies in the record would probably prevent the Court from reaching the question presented and lead it to

dismiss the petition as improvidently granted.[8]

These holes in the record also militate against applying the search-incident-to-arrest doctrine at all in this case. "[A] search can be incident to an arrest only if it is substantially contemporaneous with the arrest" and not "remote in time or place from the arrest." *Stoner* v. *California*, 376 U.S. 483, 486 (1964); *United States* v. *Chadwick*, 433 U.S. 1, 15 (1977) (internal quotation marks omitted), *abrogated on other grounds by California* v. *Acevedo*, 500 U.S. 565, 578-79 (1991). Ohio bears the burden of proving all elements of the search-incident-to-arrest exception, including that the search was contemporaneous with the arrest.

Ohio concedes that the record "is not entirely clear . . . whether the cell phone was first searched on scene or when the detectives returned to the police station." Pet. 15. All we know is that the search took place sometime between the 6:30 p.m. arrest and the 10:35 booking of the phone into evidence. Searches incident to arrest must occur as soon as practicable, and Ohio offers no explanation or justification for a delay of four hours.

---

[8] *Cf. State* v. *Nix*, No. 07122775, A138483, 2010 WL 2508919, at *9-*10 (Or. App. June 23, 2010) ("Ultimately, on a fully developed record, there could be some merit to th[e] claim" "that cellular telephones are so special, indeed unique, . . . that they must be treated differently . . . [from] calendars, address books," and the like, but "[w]e decline to decide such substantial and complex issues on an underdeveloped record.").

Courts regularly refuse to treat searches as incident to arrest when they involve even shorter delays. *See, e.g.*, *Chadwick*, 433 U.S. at 15 (rejecting search "conducted more than an hour after federal agents had gained exclusive control of the footlocker"); *United States* v. *$639,558*, 955 F.2d 712, 716-17 & n.7 (D.C. Cir. 1992) (rejecting search conducted between 30 and 63 minutes after arrest); *United States* v. *Vasey*, 834 F.2d 782, 787-88 (9th Cir. 1987) (rejecting search 30-45 minutes after arrest).

The absence of a contemporaneous search is an independent ground supporting the decision below, which makes it unnecessary to reach the Fourth Amendment question presented.

B. Any Ruling by This Court May Not Affect the Ultimate Outcome of This Case

Resolving the question presented may well make no difference to the ultimate outcome of this case. Ohio argues that "[e]ven if this Court finds that the search of the cell phone is improper, the Defendant cannot show based upon the overwhelming evidence of guilt, that he is prejudiced" by the admission of this evidence. Pet. 4-5. Ohio views "the introduction of the evidence obtained from Smith's cellular phone [as] purely corroborative, and [as] hardly prejudicial." *Id.* at 5. This harmless-error question, however, is a question of state law which either was answered implicitly (in the negative) by the Ohio

Supreme Court or will possibly be answered by the trial court on remand. It is not a question for this Court.

But by taking the position that the cell phone evidence was merely corroborative, Ohio has given another reason to decline review. Whether this Court affirms or reverses the Ohio Supreme Court on the merits, thereby allowing or disallowing the cell phone evidence, Ohio claims that it would still have sufficient evidence to convict Mr. Smith. This Court's ruling therefore would not change the outcome.

IV. THE DECISION BELOW IS CORRECT

With little or no guidance from other appellate precedents, the Ohio Supreme Court thoughtfully applied traditional Fourth Amendment principles to the novel question presented by a particular version of a new and evolving technology. It carefully assessed the State's legitimate interests in officer safety and evidence preservation, as well as the arrestee's substantial privacy interest in the data stored on his cell phone. The court correctly concluded that the search was unlawful. Especially on this poor record, concerning a technology that has already been surpassed, there is no need for this Court's review.

1. The Fourth Amendment presumptively requires warrants for searches. Warrantless searches are "*per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and

well-delineated exceptions." *Katz* v. *United States*, 389 U.S. 347, 357 (1967) (footnote omitted).

Ohio rests its argument entirely on the exception for searches incident to arrest. Pet. i, 3, 8, 11-18, 20-21, 23-25. Such searches must occur at the time of the arrest. *Stoner*, 376 U.S. at 486; *Chadwick*, 433 U.S. at 15. The search here may have occurred as much as four hours after Mr. Smith's arrest. Ohio therefore failed to satisfy its burden of proving that the search was contemporaneous with the arrest. As the dissenting judge in the Ohio Court of Appeals stated, this alone should have rendered the search-incident-to-arrest exception inapplicable. Pet. App. 41a-42a. The Ohio Supreme Court's decision is sustainable on this ground alone, regardless of any considerations unique to cell phone searches.[9]

2. The search-incident-to-arrest exception to the warrant requirement was adopted to protect officer safety by removing any weapons from arrestees, and to prevent arrestees from concealing or destroying evidence. *Chimel*, 395 U.S. at 762-63; *see also New York* v. *Belton*, 453 U.S. 454, 457 (1981). Absent highly unusual circumstances hard to imagine, a cell phone could not pose either of these dangers, certainly not once the police have seized the phone. Ohio does not

[9] Respondent, of course, may argue any ground in support of the judgment below. *Langnes* v. *Green*, 282 U.S. 531, 539 (1931).

contend that Mr. Smith's cell phone posed any danger to officer safety or that the warrantless search was needed to preserve evidence.[10] These two rationales simply do not apply to cell phone searches. And Ohio did not even argue in the lower courts that there were exigent circumstances, thereby forfeiting that argument. Pet. App. 14a, 920 N.E.2d at 955.

Absent the concerns that originally engendered the search-incident-to-arrest exception, the exception should not apply. *Cf. Terry* v. *Ohio*, 392 U.S. 1, 19 (1968) ("The scope of the [warrantless] search must be strictly tied to and justified by the circumstances which rendered its initiation permissible") (quotations and citations omitted).

3. As the Ohio Supreme Court held, the closed-container line of cases is not relevant or helpful in analyzing cell phone searches. Those cases do not reflect the realities of newer cell phones. Police interests in officer safety and evidence preservation are almost nonexistent, while individuals' reasonable expectations of privacy in the wealth of information on their phones are enormous. The decision below rightly

---

[10] Ohio acknowledges that the phone was not a smart phone that might have contained data-erasing software. *See* Pet. 3, 13-14. Especially after the officers secured the phone, neither Mr. Smith nor anyone other than the officers could access or erase its contents. The officers never expressed any concerns about the potential destruction of evidence; in fact, they took their time in getting around to searching the phone. And even if any data could have been erased, the officers could have gotten the call log data by subpoenaing the phone service provider without searching the cell phone at all.

respects the Fourth Amendment's concern for protecting a person's "papers and effects" from governmental intrusion.

4. The merits of this case, however, simply are not presented for this Court's review. As explained above, review of the merits would be fatally hampered by (a) the absence of a clear, complete record; (b) the lack of considered precedents from state and federal appellate courts on similar facts; (c) the inability to address particular issues because they were forfeited; and (d) the presence of alternative, independent grounds for affirming the judgment below. This Court should await an appropriate case in which to consider these novel issues.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

STEPHANOS BIBAS
Counsel of Record
NANCY BREGSTEIN GORDON
University of Pennsylvania Law
School Supreme Court Clinic
3400 Chestnut Street
Philadelphia, PA 19104
(215) 746-2297
sbibas@law.upenn.edu

CRAIG M. JAQUITH
Office of the Ohio Public
Defender
250 East Broad Street
Suite 1400
Columbus, OH 43215
(614) 466-5394

August 30, 2010

170

(2)

Supreme Court, U.S.
FILED
SEP - 9 2010
OFFICE OF THE CLERK

No. 09-1377

In the Supreme Court of the United States

THE STATE OF OHIO,

Petitioner,

v.

ANTWAUN SMITH,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

PETITIONER'S REPLY BRIEF

STEPHEN K. HALLER*
PROSECUTING ATTORNEY
ELIZABETH A. ELLIS
ASSISTANT PROSECUTING ATTORNEY
GREENE COUNTY PROSECUTOR'S OFFICE
61 GREENE STREET, SECOND FLOOR
XENIA, OH 45385
(937) 562-5250
shaller@co.greene.oh.us

* *Counsel of Record*
Counsel for Petitioner

September 9, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. IN THE INSTANT CASE, THE OHIO SUPREME COURT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT DIRECTLY AND INTOLERABLY CONFLICTS WITH THE UNITED STATES COURTS OF APPEALS AND THE SUPREME COURT OF CONNECTICUT, SUBJECTING LAW ENFORCEMENT AGENCIES TO INCONSISTENT MANDATES..... 3

II. THE ISSUE OF WHETHER A CELL PHONE IS A CONTAINER AND IS CAPABLE OF BEING REASONABLY SEARCHED AS SUCH INCIDENT TO ARREST IS RIPE FOR THIS COURT'S REVIEW..... 4

III. THE RECORD IN THE INSTANT CASE IS SUFFICIENT TO ADDRESS THE QUESTION PRESENTED..... 6

IV. THE DECISION OF THE OHIO SUPREME COURT IS FLAWED..... 7

CONCLUSION 8

TABLE OF AUTHORITIES

Cases

New York v. Belton,
435 U.S. 454 (1981) 7

State v. Boyd,
922 A.2d 1071 (Conn. 2010) 3

United States v. Edwards,
415 U.S. 800 (1974) 6

United States v. Finley,
477 F.3d 250 (C.A. 5, 2007) 3

United States v. Murphy,
522 F.3d 405 (C.A. 4, 2009) 3

Other

2009 CTIA-The Wireless Association®'s Semi-Annual Wireless Industry Survey, http://files.ctia.org/pdf/CTIA_Survey_Year_End_2009_Graphics.pdf 2

INTRODUCTION

The Respondent contends that certiorari should not be granted in the case because the State of Ohio's claim of conflict is not mature, and this Court needs to let the issue percolate in the lower courts before passing upon the issue of whether it is reasonable to search a cell phone as a container incident to arrest. However, any further delay of this issue will lead to untenable and inconsistent application of the Fourth Amendment across the nation with regard to searches of cellular phones. Presently, law enforcement must follow different protocol regarding a search of a cell phone incident to arrest in pursuit of a criminal suspect in Kentucky than if that suspect crosses the Ohio River into Ohio.

Respondent also maintains that this Court should await further technological developments in smart phones before it passes on this issue. However, this argument ignores the fact that not every citizen has smart phones, and many criminals use basic phones to commit crimes. Further, it is respectfully submitted that cellular phone technology will continue to evolve and there will never be a time when there is a national standard. Moreover, the potential capabilities of a cell phone are not at issue in this case, just its capabilities as an address book and recent call log. Most importantly, it is becoming increasingly important for this Court to address the status of a cell phone found on a person incident to arrest, as there are more than 285,000,000 wireless cellular phone subscriptions in this county, which is nearly 91 % of the nation's

population.[1] There is no consistency regarding this increasingly popular technology, and law enforcement needs this Court's guidance.

The record below is sufficient to warrant this Court's review, as it clearly establishes that the search of the cell phone was conducted incident to the Respondent's lawful arrest. The issue is whether the phone is a container capable of being searched without a warrant, or whether law enforcement must separately obtain a warrant after seizure of the phone from the Respondent's person. The Ohio Supreme Court's flawed analysis of this issue misconstrues traditional Fourth Amendment principles to prohibit some imaginary future invasion of privacy that is not at issue in this case.

Under these circumstances, the Petition should be granted, the ruling of the Ohio Supreme Court overturned, and this matter remanded for further proceedings.

---

[1] 2009 CTIA-The Wireless Association®'s Semi-Annual Wireless Industry Survey, http://files.ctia.org/pdf/CTIA_Survey_Year_End_2009_Graphics.pdf

I. IN THE INSTANT CASE, THE OHIO SUPREME COURT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT DIRECTLY AND INTOLERABLY CONFLICTS WITH THE UNITED STATES COURTS OF APPEALS AND THE SUPREME COURT OF CONNECTICUT, SUBJECTING LAW ENFORCEMENT AGENCIES TO INCONSISTENT MANDATES.

The holding of the Ohio Supreme Court that a cell phone is not a container and that, "the warrantless search of data within a cell phone seized incident to a lawful arrest is prohibited by the Fourth Amendment when the search is unnecessary for the safety of law enforcement and there are no exigent circumstances" is in direct conflict with decisions Fifth and Fourth Circuit Courts of Appeal, which have held that cell phones are containers and may be searched incident to lawful arrest for evidence preservation. *State v. Smith*, 124 Ohio St. 3d 163, 2009-Ohio-6426; *cf. United States v. Finley*, 477 F.3d 250 (C.A. 5, 2007); *United States v. Murphy*, 522 F.3d 405 (C.A. 4, 2009). Further, the Supreme Court of Connecticut has also held that a cell phone found on the front passenger seat of a defendant's car when that defendant is arrested is a container a capable of being searched without a warrant. *State v. Boyd*, 922 A.2d 1071 (Conn. 2010). While the *Boyd* case was decided under the automobile exception to the warrant requirement, it is still relevant to the present inquiry as the court's analysis still turns on whether the cell phone can be searched as a container. Therefore, the argument of the Respondent that there is no clear conflict in authority must be rejected.

The Ohio Supreme Court decision below is specifically premised upon the majority's conclusion that a cell phone is not a container. Thus, the status of a cell phone as a container and when and whether it can be searched is unsettled and afforded disparate treatment throughout the nation. Law enforcement officers must now follow diverse Fourth Amendment protocols regarding cell phones depending on the jurisdiction and citizen are afforded different Fourth Amendment protections depending upon their state of residence and/ or the law enforcement agency investigating them. Moreover, this conflict is important and recurring as more than 285,000,000 Americans now have cell phone subscriptions. Every day, law enforcement officers across the country are arresting suspects who possess cell phones and those officers need guidance as to proper and consistent protocol for searching cell phones seized incident to arrest.

II. THE ISSUE OF WHETHER A CELL PHONE IS A CONTAINER AND IS CAPABLE OF BEING REASONABLY SEARCHED AS SUCH INCIDENT TO ARREST IS RIPE FOR THIS COURT'S REVIEW.

Respondent also maintains that this Court should not yet entertain the issue of whether a cell phone is a container for Fourth Amendment purposes because the capabilities of the cell phones at issue in these cases are not clear from the case law, and because the technology of the cell phone in this case was short-lived. The State of Ohio respectfully submits that this Court need not delve into abstract capabilities of

various cell phone technologies in order to decide this case.

The State of Ohio's very narrow request is for this Court to review the reasonableness of a search of a cell phone's address book/contact list and call log incident to arrest, where law enforcement has probable cause to believe that the phone contains evidence of the crime for which the suspect was arrested. It is axiomatic that all cell phones, from smart phones to disposable prepaid phones have the capabilities of storing frequently called numbers and recent calls made and received, have had these capabilities for some time, and will have them for the foreseeable future. Respondent's concern that the functions and capabilities of the cell phone in the instant case somehow relate to his privacy interest in the phone is simply misplaced because it is premised on the notion that those people who can afford more expensive and therefore more technologically advanced cell phones have a greater privacy interest and should be given greater constitutional protections than those who have more basic cell phones. The State of Ohio is not asking this Court to review the abstract capabilities of cell phones; rather Ohio is seeking this Court's ruling as to the status of cell phones within the Fourth Amendment. The factual determination as to what is a reasonable search turns on the conduct of the officers and facts of the crime known to the officer at the time of the search, not the capabilities of the item being searched. Most containers are capable of storing myriad items, but whether they can be searched depends on the object's status as a container, not what it could hold. If this Court determines that cell phones are containers and can store evidence of criminal activity, then the phones may be reasonably searched

for that evidence without a warrant incident to arrest or if found in an automobile, regardless of their capabilities.

III. THE RECORD IN THE INSTANT CASE IS SUFFICIENT TO ADDRESS THE QUESTION PRESENTED.

The Respondent further complains that the record is unclear as to who searched the phone, where and when the phone was searched, and what components of the phone were searched. A more thorough review of the record below reveals that these questions are sufficiently answered to determine whether a cell phone may be searched incident to arrest.

First, both Detectives Polston and Molnar of the Beavercreek Police Department searched the Respondent's cell phone. Supp. Hr'g. Tr. 33; Trial Tr. 128, 327-328. Detective Polston also testified that he and Detective Molnar might have searched the phone initially at the scene, but he definitely remembered searching the phone when he first got to the police station. Supp. Hr'g. Tr. 33. It is further clear that the Detectives searched the recent calls and address book of the cell phone seized and documented the evidence of the calls Respondent placed to the informant's cell phone. Trial Tr. 128-132. Moreover, it is undisputed below that the cell phone was immediately associated with the person of the Respondent at the time of his arrest as it was held in his clothing and the trial court properly applied the reasoning of *United States v. Edwards*, 415 U.S. 800, 805 (1974), that once an accused has been lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of

arrest may lawfully be searched and seized without a warrant even after a substantial time lapse between the arrest and later administrative processing. Accordingly, the record is sufficient for this Court to address the status of a cell phone as a container to be searched incident to a lawful arrest.

Moreover, resolving the question presented is relevant to the ultimate outcome of the case. Without intervention from this Court, the Respondent's conviction will be vacated and the case will have to be reset for trial. Even though it is the position of the State of Ohio that the evidence obtained from the cell phone is corroborative, it is premature to suggest that a retrial would automatically end in the same result of conviction.

IV. THE DECISION OF THE OHIO SUPREME COURT IS FLAWED.

The decision of the Ohio Supreme Court is in error as it applied a flawed and archaic understanding of *New York v. Belton*, 435 U.S. 454 (1981) to the instant case. Moreover, it needlessly delves into abstract cell phone capabilities not at issue in the instant case to announce a sweeping new Fourth Amendment rule that is at odds with Circuit Courts of Appeal and the Supreme Court of Connecticut. The search at issue here is nothing more than a search of an electronic address book and call log. Beavercreek Police Detectives had probable cause to believe the Respondent's cell phone contained evidence of the crime for which he was arrested and reasonably searched the Respondent's cell phone incident to his arrest to look for that evidence.

CONCLUSION

Based upon the foregoing reasons, and those set forth more fully in the State of Ohio's Petition, the State of Ohio respectfully requests this Court grant its petition for a writ of certiorari.

Respectfully Submitted,

PROSECUTING ATTORNEY,
GREENE COUNTY, OHIO

STEPHEN K. HALLER (#0009172)
PROSECUTING ATTORNEY
Counsel of Record
Elizabeth A. Ellis (#0074332)
Assistant Prosecuting Attorney
61 Greene Street, Second Floor
Xenia, OH 45385
(937) 562-5250
shaller@co.greene.oh.us